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No. 84-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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BALDWIN-UNITED CORPORATION
and D. H. BALDWIN COMPANY,
*Petitioners,*

v.

ROBERT M. EUBANKS, III, INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS,
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS**

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## QUESTIONS PRESENTED

Petitioners, debtors in federal bankruptcy proceedings, and respondent, the state rehabilitator of insurance company affiliates of debtors, have executed a settlement agreement on all material issues forming the basis of this litigation. Prior to negotiation and execution of the settlement agreement, the Supreme Court of Arkansas issued the opinion to which this petition for a writ of certiorari is directed, upholding application of a state court injunction against petitioners and the federal court. If applicable, the injunction would prevent any further proceedings in federal court to determine claims by petitioners against respondent. In these circumstances, the questions presented are:

1. Should the petition for a writ of certiorari be granted and the opinion of the Supreme Court of Arkansas vacated because execution of the settlement agreement has rendered moot the dispute over the proper forum for adjudication of claims and, thus, there is no live case or controversy at the present time?

2. If the dispute is not moot, may a state court supervising the rehabilitation of insurance companies enjoin the federal court from exercising jurisdiction over claims (and debtors from pursuing claims) in federal bankruptcy proceedings?

## PARTIES TO THE PROCEEDINGS

Petitioners are Baldwin-United Corporation and D. H. Baldwin Company.* Respondent is Robert M. Eubanks, III, Insurance Commissioner for the State of Arkansas, as successor in office to Linda N. Garner. Respondent represents, as court-appointed rehabilitator, National Investors Pension Insurance Company, National Investors Life Insurance Company, and Mt. Hood Pension Insurance Company. Other parties below, who are not affected by issues raised in this petition or any that might be raised and whose consolidated appeal was resolved by a separate decision of the Arkansas Supreme Court, *Mendel v. Garner*, 678 S.W.2d 759 (Ark. 1984), are Jack Mendel, G. William Ogden (Trustee for Richard J. Ogden) and Richard J. Ogden.

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* In accordance with Supreme Court Rule 28.1, the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioners are set forth in App. G hereto.

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FOR THE STATE OF ARKANSAS,
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

---

Baldwin-United Corporation and D. H. Baldwin Company hereby petition for a writ of certiorari to the Supreme Court of the State of Arkansas in this case.

## OPINIONS BELOW

The opinion of the Arkansas Supreme Court, affirming the state circuit court, is reported at 283 Ark. 385, 678 S.W.2d 754 (1984), and appears at App. A. The opinion and order of the circuit court is unreported and appears at App. B.

## JURISDICTION

The opinion of the Arkansas Supreme Court, the highest court of the state, was entered on October 22, 1984. On January 10, 1985, Justice Blackmun extended petitioners' time to file a petition for a writ of certiorari to and including March 21, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, Clause 4 (the Bankruptcy Clause).

United States Constitution, Article VI, Clause 2 (the Supremacy Clause).

Certain provisions of the Bankruptcy Reform Act of 1978 (the Bankruptcy Code), 11 U.S.C. §§ 101 *et seq.*

Certain provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.

Certain provisions of The Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C.A. §§ 157, 1334.

The constitutional and statutory provisions involved are reprinted in App. F.

## STATEMENT

This case presents fundamental issues concerning the power of state courts to enjoin federal courts from adjudicating in bankruptcy proceedings debtors' claims that certain assets are property of the bankrupt estates. Petitioners, Baldwin-United Corporation and D. H. Baldwin Company (collectively "Baldwin"), are the debtors in the largest federal bankruptcy reorganization proceeding in history. *Stoller v. Baldwin-United Corp.*, 41 B.R. 884, 885-86 (S.D. Ohio 1984). The assets at issue here are vitally needed if Baldwin is to reorganize. They consist of hundreds of millions of dollars in cash and stock of an affiliated company, assets that Baldwin contends were fraudulently or preferentially transferred to related insurance companies. Assets so transferred are property of the debtors' estates and within the federal court's jurisdiction under the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, and 28 U.S.C.A. § 1334.[1]

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[1] All citations to U.S.C.A. are to West Supp. 1984. (See App. F, 53a n.*.)

The insurance companies holding these assets currently are in rehabilitation in Arkansas under the direction of respondent, the Arkansas Insurance Commissioner (the "Rehabilitator"). The state court asserts that its general jurisdiction over the insurance companies' rehabilitation carries with it the authority to enjoin Baldwin from invoking the jurisdiction of the federal court over its claims, as well as the power to prohibit the federal bankruptcy court from exercising its jurisdiction over those core federal claims. At issue here is the validity of the injunction.

In its decision below, the Supreme Court of Arkansas upheld the state court order enjoining the federal court and the parties to a parallel federal proceeding. It concluded that "since the Bankruptcy Act does not specifically relate to the business of insurance, and indeed expressly excludes insurance companies from being debtors in bankruptcy, [Baldwin] cannot pursue [its] claims under the Bankruptcy Act once enjoined by a valid state injunction." (App. A, 8a.) In so doing, the Arkansas Supreme Court relied on the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which preserves state regulation of "the business of insurance," and Section 109 of the Bankruptcy Code, 11 U.S.C. § 109(b) and (d), which precludes insurance companies, banks and savings and loan institutions from being debtors under the Bankruptcy Code. The Arkansas Supreme Court's expansive interpretation of these provisions is contrary to substantial precedent of this Court and, if allowed to stand, will seriously undermine the federal bankruptcy system and cast doubt on the applicability of numerous other federal laws to these and other state-regulated institutions.

However, this case does not currently present a live controversy, for after the Supreme Court of Arkansas rendered its decision, the parties executed a Settlement Agreement (the "Settlement") (App. E) that resolves all of the disputed issues between them concerning the above-

described assets.[2] The parties to the Settlement anticipate successful effectuation of all of its terms and have agreed not to pursue further litigation over the assets. Therefore, the issue addressed by the court below—whether the state court may enjoin the bankruptcy court from adjudicating and Baldwin from pursuing its claims against the Rehabilitator in federal court—does not currently present a live case or controversy. Because this Court is without jurisdiction to consider this petition for review on the merits, certiorari should be granted and the judgment of the court below vacated. While it is not anticipated that litigation of the claims will become necessary, this would preserve the rights of the parties should the issue ripen at some point in the future.

If not vacated, the decision of the Supreme Court of Arkansas threatens to undermine the protections afforded Baldwin by the uniform national bankruptcy system. In reaching its result, the Supreme Court of Arkansas has made an extraordinary attempt to prohibit a federal court from assuming jurisdiction granted to it by Congress. The Arkansas court has failed to follow repeated decisions of this Court holding that state courts may not enjoin litigants or federal courts themselves from adjudicating rights granted by federal law. That fundamental error, together with its importance to the many companies with insurance, bank, and savings and loan subsidiaries, merits the attention of this Court.

### A. The Proceedings Below And Related Proceedings In The Bankruptcy Court.

Petitioner Baldwin-United Corporation is a publicly owned, diversified financial services holding company and is the corporate parent of a group of companies, including a holding company subsidiary, petitioner D. H. Bald-

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[2] The Indiana Insurance Commissioner, as rehabilitator of three affiliated insurance companies in Indiana with whom petitioners have a similar dispute, also is a party to the Settlement.

win Company. Petitioners are currently in reorganization proceedings under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1174, in the United States Bankruptcy Court for the Southern District of Ohio ("the bankruptcy court"), by Order of Reference from the district court.[3]

On July 13, 1983, the Circuit Court of Pulaski County, Arkansas entered Orders of Rehabilitation for three Arkansas insurance companies, each of which is a subsidiary or affiliate of Baldwin. (See App. C.) The Arkansas companies were primarily engaged in the business of selling and reinsuring single premium deferred annuities ("SPDAs"), which provide a deferred stream of income in exchange for a one-time premium. The Arkansas circuit court appointed respondent[4] as Rehabilitator of the Arkansas companies and ordered the Rehabilitator to take possession of all of their property and to propose a plan for their rehabilitation (the "Plan of Rehabilitation"). Certain of the assets seized by the Rehabilitator pursuant to that order are the subject of this controversy.

As described by the Supreme Court of Arkansas, the Arkansas circuit court's July 13, 1983 orders asserted exclusive jurisdiction over all property in the physical possession of the Arkansas companies and:

> entered an injunction "restraining all persons and other legal entities" from the "making of claims or the commencement of further prosecution of any actions in law or equity or administrative [proceedings] except in this Court", and from "the making of any levy, garnishment or execution against any of the property, personal or real, of [the Arkansas companies] or [their] assets or [their] policyholders."

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[3] *In re The Bankruptcy Amendments and Federal Judgeship Act of 1984*, No. MS-1-84-152 (S.D. Ohio July 30, 1984).

[4] Linda N. Garner, former State Insurance Commissioner and the Rehabilitator originally appointed by the court, was succeeded in office and therefore replaced as Rehabilitator by Robert M. Eubanks, III, in January of this year.

(App. A, 2a.) Further, the court "announced it would not recognize any judgment affecting the Arkansas insurance companies from any other court." (*Id.*, 4a.)

Pursuant to a bankruptcy court order authorizing it to intervene in the Arkansas rehabilitation proceeding in order to "protect the interests of the debtor estates" (App. D, 19a), Baldwin appeared and challenged certain aspects of the proposed Plan of Rehabilitation, including the provisions that continued in effect the state court's injunction and its orders asserting exclusive jurisdiction over property in the possession of the Arkansas companies.[5] The circuit court approved the Plan of Rehabilitation, however, without modifying these provisions. (App. B.)

On October 22, 1984, the Supreme Court of Arkansas affirmed the lower court injunction and assertion of exclusive jurisdiction, stating:

> By [the circuit court] rulings [Baldwin is] enjoined both from bringing [its] claims in bankruptcy court and from petitioning the bankruptcy court to determine whether certain assets should be included in the bankruptcy estate. *The bankruptcy court is also enjoined from attempting to exercise jurisdiction over assets which [Baldwin] assert[s] might be determined to be part of [Baldwin's] bankruptcy estate.*

(App. A, 5a.)[6]

Meanwhile, on September 28, 1984, pursuant to a bankruptcy court order setting a bar date for the submission of proofs of claims, the Rehabilitator filed claims in the bankruptcy court against Baldwin for in excess of $2 billion (specifically reserving any exceptions to the federal

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[5] The bankruptcy court order stated that intervention shall not be deemed "a waiver of the jurisdiction of this Court to determine any claims between Baldwin . . . and the companies involved in the Arkansas . . . Proceedings." (App. D, 19a-20a.)

[6] Emphasis added throughout unless otherwise indicated.

court's jurisdiction). Baldwin subsequently filed counterclaims against the Rehabilitator seeking the return of the hundreds of millions of dollars in assets underlying this dispute that former management transferred to the Arkansas companies.[7] Baldwin asserts that the pre-petition transfers constitute fraudulent and preferential transfers and are void under the Bankruptcy Code, 11 U.S.C. §§ 544, 547 and 548.[8]

The bankruptcy court presently has under submission motions to dismiss or abstain filed by the Rehabilitator that challenge the bankruptcy court's jurisdiction over Baldwin's counterclaims against him and his claims against Baldwin. See p. 13 n.15 *infra*. The Rehabilitator's motions rely, in large part, on the validity of the state court injunction.

**B. The Settlement Agreement.**

On January 11, 1985, Baldwin and the Rehabilitator entered into the Settlement which, when consummated, will resolve the claims that give rise to the jurisdictional dispute and related injunction that are the subject of this petition. The Settlement provides for the payment of $170 million (subject to adjustment) to the rehabilitators (Arkansas and Indiana) for the benefit of SPDA policyholders and calls for complete releases from Baldwin. Baldwin, in turn, will receive certain affiliate assets currently in the rehabilitators' possession, limited payments, and re-

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[7] In addition, Baldwin filed counterclaims in the bankruptcy court against the Rehabilitator under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968.

[8] Similar counterclaims by Baldwin are pending in the bankruptcy court against the three related Indiana insurance companies. The Indiana Insurance Commissioner, as rehabilitator, also filed claims against Baldwin identical to those filed by respondent in federal bankruptcy court. The Indiana circuit court approved an identical Plan of Rehabilitation and issued a similar injunction against Baldwin. An appeal from that order is pending in the Indiana Court of Appeals.

leases from both rehabilitators.[9] The Settlement's terms will be incorporated into Baldwin's Plan of Reorganization subject to confirmation by the bankruptcy court.

Effectuation of the Settlement is well under way. It has been approved by all courts from whom approval is required.[10] The Settlement envisions the sale of a substantial Baldwin affiliate (Mortgage Guaranty Insurance Corporation, or "MGIC"), resolution of Baldwin's federal tax obligation and the disposition of certain bank claims against a Baldwin subsidiary. The sale of MGIC was approved by the bankruptcy court on February 19, 1985 and closed on February 28, 1985. Negotiations with the Internal Revenue Service are well along and should be completed within the next 60 days. Negotiations also are ongoing with certain bank creditors.

Although the Settlement is terminable under certain circumstances,[11] it has eliminated the current dispute between the parties over the appropriate forum for litigation of Baldwin's claims against the Rehabilitator.

### C. Federal Questions Raised And Decided Below.

The primary issue before the Court at this time is whether the federal questions raised and decided below have become moot by reason of the Settlement, in which case the judgment of the court below should be vacated.[12]

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[9] Throughout its operation, the Settlement requires the mutual cooperation of the parties, imposes certain financial limitations on the parties, and provides for the tolling of all applicable statutes of limitation.

[10] These are the bankruptcy court (February 14, 1985), and the Arkansas and Indiana circuit courts (February 22, and March 20, 1985, respectively).

[11] The Settlement is terminable if no Plan of Reorganization is confirmed by January 15, 1986; or if certain other conditions are not met by July 13, 1986 (subject to adjustment thereafter under certain circumstances).

[12] The parties are obligated to bring the mootness issue to the Court's attention, even though it was not a question below. *See Board of License Comm'rs v. Pastore*, 105 S. Ct. 685, 686-87 (1985) (per curiam).

*See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 & n.2 (1950).

However, several controlling federal questions were raised by Baldwin in its challenge to the Plan of Rehabilitation (R. 1369, 1567-73) and rejected by the courts below. Baldwin unsuccessfully urged in the circuit court and again in the Supreme Court of Arkansas that the injunction was invalid because Baldwin's claims to assets in the possession of the Rehabilitator are within the exclusive jurisdiction of the bankruptcy court and state courts may not interfere with the bankruptcy court's exercise of its exclusive jurisdiction, a question that is a matter of federal law. *See, e.g., Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940); *Texas v. Wellington Resources Corp.*, 706 F.2d 533, 536 (5th Cir. 1983); *Gibbs v. Housing Authority (In re Gibbs)*, 9 B.R. 758, 762-63 (Bankr. D. Conn. 1981). Further, as Baldwin argued in the court below, fraudulent transfer and preference claims under the Bankruptcy Code are core *in personam* proceedings that the state courts may not enjoin federal courts from adjudicating. This, too, is a controlling question of federal law. *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977) (per curiam); *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964).

Baldwin's causes of action against the Rehabilitator were filed as compulsory counterclaims to the closely related claims filed by the Rehabilitator in the bankruptcy court. Both Baldwin's and the Rehabilitator's claims are also interrelated with other claims on file in the bankruptcy case that will be determined by the bankruptcy court. As a result, requiring Baldwin to litigate its claims in a forum other than the bankruptcy court would substantially interfere with its ability to reorganize under the Bankruptcy Code, itself a federal question raised in both courts below.

The Arkansas Supreme Court concluded, however, that certain provisions of federal law that exclude insurance

companies from becoming debtors in bankruptcy, 11 U.S.C. § 109(b)(2) and (d), and that leave to the states regulation of "the business of insurance," 15 U.S.C. § 1012(b), strip the bankruptcy court of the jurisdiction it otherwise has. (App. A, 6a-9a.) This, too, is a controlling question of federal law.

## REASONS FOR GRANTING THE WRIT

The Arkansas Supreme Court has rendered an extraordinary opinion holding that a state court may enjoin a federal court from exercising jurisdiction over claims by debtors in bankruptcy to property that may be part of the bankrupt estates. An attempt by a state court to enjoin any federal court from exercising its jurisdiction would be of doubtful validity. Here, federal interests of the highest order are at stake because of the "unrestricted and paramount" power of Congress "to establish uniform laws on the subject of bankruptcies throughout the United States," *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929), and the goal "to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period," *Ex parte Christy*, 44 U.S. (3 How.) 292, 312 (1845).

The state court's asserted interest in controlling assets in the possession of insurance companies in state rehabilitation proceedings is an altogether inadequate justification for interference with federal court proceedings. While the state courts and not the federal courts have the power to rehabilitate insurance companies, that state power cannot be used to interfere with the reorganization of companies that are within the federal court's bankruptcy jurisdiction. If such state power is legitimated, it could be invoked to enjoin federal courts from exercising jurisdiction over a variety of statutes protecting important federal interests, such as employment discrimination claims that might reduce the assets available to the rehabilitator or copyright infringement actions that might deprive the rehabilitation court

of control over certain property. More importantly, the Arkansas court's parochial view is not limited to insurance companies in rehabilitation. Its conclusion could also deprive the federal courts of jurisdiction over important federal interests affecting failed banks, savings and loan associations, and other entities regulated by states but also subject daily to a variety of federal laws.

The Arkansas court has gone too far. This Court should not condone a state court injunction that prohibits Baldwin from pursuing and the federal court from determining claims (if and when live) to property that may be part of the bankrupt estates.

## I. THE WRIT SHOULD BE GRANTED AND THE JUDGMENT BELOW VACATED BECAUSE THERE IS NO CURRENT LIVE CASE OR CONTROVERSY.

The parties have entered into a Settlement that will eliminate the need for litigating the claims underlying this action in any court—federal or state. The only possibility of further litigation is if the Settlement terminates, which is unlikely and in any event cannot occur before January 15, 1986.

There is, therefore, no current live case or controversy between the parties, and the writ should be granted and the judgment below vacated.[13] This is the proper procedure when a case becomes moot pending appeal or consideration of a petition for a writ of certiorari.

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[13] The question whether a case is moot because there is no current live case or controversy "is itself a question of federal [constitutional] law upon which [the Supreme Court of the United States] must pronounce final judgment." *Liner v. Jafco, Inc.*, 375 U.S. 301, 304 (1964). "Even in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). The federal mootness rule prevails even where, as a matter of state law, a "great public interest in the continuing issues raised by this appeal" exists. *DeFunis*, 416 U.S. at 316.

> That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved . . . .

*Munsingwear*, 340 U.S. at 40. *See also, e.g., DeFunis*, 416 U.S. at 319-20; *SEC v. Harrison*, 340 U.S. 908 (1951) (per curiam); *Howard v. United States*, 340 U.S. 898 (1950) (per curiam); *Munsingwear*, 340 U.S. at 39 & n.2; *Riley v. International Brotherhood of Teamsters*, 336 U.S. 930 (1949) (per curiam); *Dyer v. City Council of Beloit*, 333 U.S. 825 (1948) (per curiam); *Natural Milk Producers Ass'n v. San Francisco*, 317 U.S. 423, 424 (1943) (per curiam). *Cf. Brockington v. Rhodes*, 396 U.S. 41 (1969) (per curiam). The judgment must be vacated or Baldwin will be seriously prejudiced because there is a possibility the bankruptcy court might be precluded by *res judicata* from determining its own jurisdiction should the Settlement terminate.[14]

The prerequisites for a live case or controversy do not exist at this time because the parties have no current intention or interest in litigating the claims at issue. Indeed, they have embarked on a joint course of conduct intended to preclude such litigation from ever becoming necessary. Thus, "regardless of any decision this Court might reach on the merits . . . the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive [federal] issues" and the case is moot. *DeFunis*, 416 U.S. at 319-20.

The question of where the claims should be litigated if it becomes necessary to do so is " 'abstract, feigned . . . hypothetical' . . . lack[ing] the 'impact of actuality' . . . the concreteness . . . of adversariness." *Alton & Southern*

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[14] *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 706-07 (1982); *see also Munsingwear. Cf. Missouri v. Public Serv. Comm'n*, 273 U.S. 126, 131 (1927).

*Railway Co. v. International Ass'n of Machinists*, 463 F.2d 872, 877 (D.C. Cir. 1972) (quoting *Sibron v. New York*, 392 U.S. 40, 57 (1968)). *See also Rice*, 404 U.S. at 246. At present, rather than being adversaries, the parties have a mutual interest in the success of the Settlement and in maximizing the value of all of Baldwin's affiliate assets. Other parties to the bankruptcy case have asserted very substantial claims derivative of the claims asserted by the Rehabilitator. Because the Settlement depends on a confirmed Plan of Reorganization and because a Plan cannot realistically be confirmed unless those derivative claims are disallowed or subordinated, Baldwin and the Rehabilitator have a mutual interest in avoiding any factual findings against Baldwin in an Arkansas court because other claimants might argue that such a holding has *res judicata* or collateral estoppel effect in the bankruptcy case, thereby depleting the assets available to other creditors and jeopardizing confirmation and, therefore, consummation of the Settlement.

Further, even if the Settlement is not successfully culminated, the parties may renegotiate its terms rather than terminate it and recommence litigation. Whether or not the parties will have reason to pursue the claims again "is purely a matter of conjecture at this point." *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406 (1972). Because the "only speculat[ion]" reasonable now is that they will not take this action, the case is moot. *Id.*[15]

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[15] In a recent filing in the bankruptcy court, the Indiana rehabilitator has interpreted the impact of the Settlement as eliminating the adversary nature of this jurisdictional dispute:

> A Settlement Agreement . . . has *resolved this proceeding* [to determine the proper forum for the claims litigation]. . . . [T]his Court need not rule on the Rehabilitators' motions [to dismiss or abstain] unless the Agreement is terminated and this litigation resumes. This Memorandum is filed only to

For these reasons, it is respectfully submitted that this Court should grant the petition, determine that the cause is moot, and vacate the judgment of the Arkansas Supreme Court.

## II. THE STATE COURT INJUNCTION IMPROPERLY INTERFERES WITH THE BANKRUPTCY COURT'S JURISDICTION OVER DEBTORS' CLAIMS.

If not moot, this case presents a vital federal question meriting this Court's attention. The Arkansas court order represents an attempt to interfere with the lawful exercise of federal court jurisdiction, not by demanding that a state court ruling be given full faith and credit by a federal court, but by enjoining the federal court, and debtors in bankruptcy under the supervision of that court, from even considering whether it has jurisdiction and, if so, whether it should be exercised. *Cf. Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1868) ("[N]o power can exist in a State to obstruct [the] right [of the federal government to transact government business] that would not enable it to defeat the purposes for which the government was established. . . . But if the government has these rights on her own account, the citizen also has correlative rights [including the right to] access to . . . the courts of justice."). The injunction is an extraordinary and extralegal attempt by the state court to interfere with the functioning of the federal courts.

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preserve the Indiana Rehabilitator's arguments in the event his motion requires a ruling in the future.

Reply Memorandum of Indiana Rehabilitator, at 1, *Baldwin-United Corp. v. National Investors Life Ins. Co. (In re Baldwin-United Corp.)*, No. 1-83-02495 (Bankr S.D. Ohio Jan. 25, 1985).

Similarly, the Settlement resulted in dismissal of other litigation between the parties. *See* Order Extending Motion and Briefing Schedule (Jan. 9, 1985) *and* Order Dismissing Appeal (Feb. 14, 1985) in *Eubanks v. Baldwin-United Corp. (In re Baldwin-United Corp.)*, No. C-1-84-1662 (S.D. Ohio) (dismissing the Rehabilitator's objection to the disposition of Baldwin's interest in a limited partnership).

### A. The Arkansas Injunction Is An Unlawful Attempt To Limit The Jurisdiction Of The Bankruptcy Court.

The Arkansas Supreme Court upheld the application of a sweeping state court injunction precluding the federal court from exercising jurisdiction over assets that "might be determined to be part of [Baldwin's] bankruptcy estate" and prohibiting Baldwin from seeking the bankruptcy court's "determin[ation] whether certain assets should be included in the bankruptcy estate." (App. A, 5a.) The injunction is wholly without authority and intrudes on an important federal interest. It purports to prevent the federal court from exercising its exclusive jurisdiction over property of Baldwin's bankrupt estates and from deciding whether to exercise its jurisdiction or to abstain in matters within its original (although not exclusive) jurisdiction.

Congress has exercised its broad power under Article I, section 8, clause 4 of the Constitution over bankruptcy matters, *see Kalb v. Feuerstein*, 308 U.S. 433, 438-39 (1940), to subject all issues involving or related to property that may be part of the estate to the exclusive or original (but not exclusive) jurisdiction of the district court, which has referred its jurisdiction over Baldwin to the bankruptcy court pursuant to 28 U.S.C.A. § 157(a). This Court need not determine whether the federal court overseeing Baldwin's bankruptcy proceeding has exclusive or original jurisdiction over debtors' claims, for the challenged state court injunction purports to prohibit the federal court from exercising *any* jurisdiction it concludes it has and prevents Baldwin from asserting its rights under the Bankruptcy Code.

The injunction tramples on the central grant of jurisdiction to the federal courts over bankruptcy matters. In 28 U.S.C.A. § 1334(d), Congress provided that "[t]he district court in which a case under title 11 is commenced or is pending shall have *exclusive* jurisdiction of all of

the property, *wherever located*, of the debtor as of the commencement of such case, and of the estate." [16] 11 U.S.C. § 541(a) defines the "estate" as being "comprised of all of the following property, *wherever located*: . . . all legal or equitable interests of the debtor in property as of the commencement of the case."

That grant of exclusive jurisdiction applies to the assets in dispute here.

> Most important, in the context of this case, § 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. . . . Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced.

*United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983).[17] A debtor has a continuing legal or equitable interest in fraudulently or preferentially transferred property, and only the bankruptcy court can determine rights to that property because it is property of the estate within the meaning of 11 U.S.C. § 541(a) regardless of where it is located. *American National Bank v. MortgageAmerica Corp.* (*In re MortgageAmerica Corp.*), 714 F.2d 1266, 1275 (5th Cir. 1983). Thus, the bankruptcy court in which Baldwin's Chapter 11 case is pending by reference from the district court has exclusive jurisdiction over assets of Baldwin that were fraudulently or preferentially transferred. *Texas v. Wellington Resources Corp.*, 706

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[16] The federal courts also have exclusive jurisdiction over Baldwin's securities and RICO claims. 15 U.S.C. § 78aa; 18 U.S.C. § 1964(c).

[17] In *Whiting Pools*, the debtor sought a turnover order pursuant to 11 U.S.C. § 542(a) to recover property that had been seized by the Internal Revenue Service pursuant to a tax lien. This Court held that "the reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization," 462 U.S. at 209, and that the property in question was subject to the bankruptcy court's turnover order.

F.2d 533, 536 (5th Cir. 1983); *Gibbs v. Housing Authority (In re Gibbs)*, 9 B.R. 758, 762-63 (Bankr. D. Conn. 1981). *See also Brown v. Dellinger (In re Brown)*, 734 F.2d 119, 123-24 (2d Cir. 1984); *Missouri v. Bankruptcy Court*, 647 F.2d 768, 774 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

This jurisdiction would be rendered meaningless if a state court were empowered to enjoin a district or bankruptcy court from determining whether assets fraudulently or preferentially transferred constitute part of the debtor's estate. Baldwin's fraudulent and preferential transfer claims seek to effectuate the overriding federal interest in recovering property of a debtor's estate in order to permit effective reorganization of the debtor and fair distribution of assets to all creditors. "The reorganization effort would have small chance of success . . . if property essential to running the business were excluded from the estate. . . . Thus, to facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate." *Whiting Pools*, 462 U.S. at 203.

Even proceedings related to property of the estate that are not subject to the exclusive jurisdiction of the federal court are nevertheless within its original (but not exclusive) jurisdiction until and unless the federal court elects to abstain in favor of another court. 28 U.S.C.A. § 1334 provides in part:

> (b) *Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.*
>
> (c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceed-

ing [within its original but not exclusive jurisdiction].

Civil proceedings to recover fraudulent or preferential transfers arise under title 11, and Section 1334 gives the federal court sole authority to decide whether it should hear such civil proceedings or abstain. *See also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 51 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6012. A state court simply cannot employ its injunctive powers to require, in effect, federal court abstention, for whether to abstain is itself a question reserved by Congress to the federal court.[18]

The bankruptcy court's interest in not being precluded from exercising its jurisdiction is particularly acute in this case since fraudulent and preferential transfer claims derive from federal law.[19] Adjudicating such claims is a

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[18] The bankruptcy court's jurisdiction over debtors' fraudulent and preferential transfer claims survives this Court's plurality decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). *Northern Pipeline* invalidated only bankruptcy court jurisdiction to decide matters not arising under the federal bankruptcy laws that could have been brought in a state court independent of any bankruptcy proceeding. *Salomon v. Kaiser (In re Kaiser)*, 722 F.2d 1574, 1580 (2d Cir. 1983). It in no way affected the jurisdiction of bankruptcy courts over traditional bankruptcy matters. *Id.* The fraudulent and preferential transfer claims at issue here arise under the Bankruptcy Code and involve "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," and thus are subject to adjudication by an Article I court. *See* 458 U.S. at 71; *Kaiser*, 722 F.2d at 1580 n.2.

The limited scope of *Northern Pipeline* was recognized by Congress in the enactment of The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 101, 104, 98 Stat. 333, 340, which expressly authorizes bankruptcy judges to hear "all core proceedings arising under title 11," including actions to determine, avoid and recover preferences and fraudulent transfers. *See* 28 U.S.C.A. § 157(b)(1), (2)(F) and (H); *see* 1 *Collier on Bankruptcy* § 3.01 at 3-26 to -29 (L. King 15th ed. 1985).

[19] These claims are based on either federal substantive law pursuant to 11 U.S.C. §§ 547 (preferences) and 548 (fraudulent con-

traditional function of bankruptcy courts. These claims are rarely, if ever, litigated in state courts. In 1984, Congress designated fraudulent transfer and preference claims as "core" bankruptcy matters. *See* 28 U.S.C.A. § 157(b)(2)(F) and (H). "Core" matters have been determined by Congress to be particularly important functions of the bankruptcy court.[20]

In sum, a state court cannot, through the guise of a preemptive injunction, foreclose a federal court from exercising its congressionally mandated bankruptcy jurisdiction, be it exclusive or original.

### B. The Arkansas Injunction Violates The General Principles Governing The Relationship Between State And Federal Courts.

Apart from the special considerations that attach to the exercise of federal jurisdiction over bankruptcy matters, the Arkansas court's injunction violates well-settled principles governing the relationship between state and federal courts. Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, a state court "[cannot] validly enjoin a person from prosecuting an action *in personam* in a district or appellate court of the United States that has jurisdiction both of the parties and of the subject matter." *Donovan v. City of Dallas*, 377 U.S. 408, 408 (1964). *See also General Atomic Co. v. Felter*, 434 U.S. 12, 17-19 (1977) (per curiam); *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671, 675-77 (7th Cir. 1979).

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veyances), or 11 U.S.C. § 544 (debtor in possession is given rights of certain creditors under state law).

[20] The federal interest here is strengthened by the possibility that determination of these claims will effectively decide many other claims on which the bankruptcy court must rule. The claims at issue here are comprehensively interrelated with many other such claims and, indeed, with the Rehabilitator's claims against Baldwin, which are clearly subject to the jurisdiction of the bankruptcy court.

Baldwin's fraudulent and preferential transfer claims are *in personam* claims. *See Coffey v. Managed Properties, Inc.*, 85 F.2d 88, 90 (2d Cir. 1936); *Kalso Systemet, Inc. v. Jacobs*, 474 F. Supp. 666, 668-69 (S.D.N.Y. 1979). The bankruptcy court need not act directly on the *res* over which the state court asserts jurisdiction, but, as in all *in personam* matters, it can compel the transferee to return the property to the defrauded transferor. *See Massie v. Watts*, 10 U.S. (6 Cranch) 148, 160 (1810); *Sax v. Sax*, 294 F.2d 133, 136-37 (5th Cir. 1961); *Mandley v. Backer*, 121 F.2d 875, 876 (D.C. Cir. 1941).[21]

The prohibition against a state court enjoining federal court proceedings would apply even if the federal court proceedings were not clearly *in personam*. *Donovan*, 377 U.S. at 412; *Princess Lida v. Thompson*, 305 U.S. 456, 465-68 (1939). As this Court has held, "an action in the federal court to establish the validity or the amount of a claim constitutes no interference with a state court's possession or control of a res." *Princess Lida*, 305 U.S. at 467. Thus, regardless of whether the bankruptcy court could direct the physical return of the cash and stock fraudulently and preferentially transferred, it cannot be enjoined by the Arkansas court from considering (or at least deciding whether to consider) the validity and amount of Baldwin's claims.

This is particularly true where, as here, the state court has not adjudicated (and is not adjudicating) any claims to the property. As the first court to assume jurisdiction over the property, the Arkansas court, *arguendo*, may have exclusive jurisdiction over the *res*, but a federal court may adjudicate rights to the property "where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state

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[21] Baldwin's securities law and RICO claims are also *in personam* since they seek damages. *See Southwestern Bank & Trust Co. v. Metcalf State Bank*, 525 F.2d 140, 142-43 (10th Cir. 1975); *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 508 (10th Cir.), *cert. denied*, 391 U.S. 905 (1968).

court is bound by the judgment to recognize the right adjudicated by the federal court." *Markham v. Allen*, 326 U.S. 490, 494 (1946). *See also United States v. Klein*, 303 U.S. 276, 281 (1938); *Barrett v. International Underwriters, Inc.*, 346 F.2d 345, 349 (7th Cir. 1965).

### C. The Arkansas Supreme Court Erred In Finding Authority For The Injunction In Section 109 Of The Bankruptcy Code And The McCarran-Ferguson Act.

Absent express *congressional* authorization, the state court's injunction is invalid. In apparent recognition of this, the Arkansas Supreme Court looked to and relied upon the Bankruptcy Code provision excluding insurance companies from becoming debtors, 11 U.S.C. § 109(b) and (d), and the McCarran-Ferguson Act ("McCarran Act"), 15 U.S.C. §§ 1011-1015, as congressional support for the circuit court's action. Neither provision, however, authorizes issuance of the injunction.

Subsections 109(b) and (d) preclude insurance companies, banks, savings and loan associations and certain other entities from becoming "debtors" under the Bankruptcy Code—nothing more. They do not carve out a special exemption for insurance companies, whether in rehabilitation or not, from the jurisdiction otherwise vested in the bankruptcy court. Indeed, "when a bankruptcy court does not take action which is tantamount to reorganizing insurance companies or adjudging them as bankrupts, . . . Section 4 [now subsections 109(b) and (d)] does not preclude it from asserting jurisdiction over claims against insurance companies pursuant to other jurisdictional statutes." *In Re Equity Funding Corp. of America*, 396 F. Supp. 1266, 1274 (C.D. Cal.), *aff'd*, 519 F.2d 1274 (9th Cir. 1975).

Resolving the claims at issue here is in no way tantamount to reorganizing the insurance companies or adjudging them debtors. The bankruptcy court will neither set priorities to assets of the insurance companies nor inhibit the state rehabilitation process. The Arkansas

injunction thus gains no support from subsections 109(b) and (d).[22]

The Arkansas Supreme Court found the McCarran Act "[o]f even greater significance." (App. A, 6a.) It provides, in pertinent part: "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Once again, the Arkansas court's reliance was misplaced.

The McCarran Act does not limit federal laws enacted pursuant to the Bankruptcy Clause; it only limits Congress' authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. *Western & Southern Life Insurance Co. v. Board of Equalization*, 451 U.S. 648, 653, 656 (1981). The McCarran Act addresses the relative authority of federal and state regulators over the "business of insurance." It was enacted in 1945 for the specific purpose of limiting *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held for the first time that the writing of insurance was commerce and therefore subject to the antitrust laws.[23] State insur-

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[22] Moreover, if subsections 109(b) and (d) were read to confer exclusive jurisdiction over claims against insurance companies on a state rehabilitation court, a conflict would arise with 28 U.S.C.A. § 1334(d), which confers exclusive jurisdiction over debtor's property and the estate on the district court, when, as here, such property includes assets in the possession of insurance companies. It would also conflict with Section 1334(b), which provides that "[*n*]*otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts*, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." On its face, this language precludes an injunction against a federal court that has original but not exclusive jurisdiction under title 11 by a court asserting that Congress has given it exclusive jurisdiction. Without a clear indication, it should not be assumed Congress intended such conflicts.

[23] *See* H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945), *reprinted in* 1945 U.S. Code Cong. Serv. 670, 671-72. The specific purpose to

ance officials were concerned that the decision might invalidate existing state taxation (due to the dormant Commerce Clause) and regulation (due to application of Commerce Clause powers) of the insurance industry. Congress therefore exempted state regulation of the "business of insurance" from limitation under the Commerce Clause, especially the federal antitrust laws. *Group Health & Life Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 217-24 (1979); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946). It did not restore the preexisting blanket limitations on federal power, but rather carved out narrow protection for the "business of insurance." *Royal Drug*, 440 U.S. at 219-20. *See also Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 413 (1954) (plurality) (conflict between the exclusive jurisdiction of a federal court sitting in admiralty and a state insurance law was "not touched" by *South-Eastern Underwriters*, and therefore the McCarran Act was "not relevant").

Congress' action to limit application of the Commerce Clause should not, without more, be read to effect a sweeping limitation on laws enacted by Congress pursuant to the Bankruptcy Clause. The McCarran Act has never before been applied to limit the jurisdiction of a bankruptcy court, and it was only through an overly broad reading of the Act ("to preserve [all insurance regulation] intact from any federal intrusion. . .") that the Arkansas Supreme Court was able to do so here. (*See* App. A, 6a.) The Arkansas court's reading of the Act directly conflicts with this Court's holding that "[i]nsurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute

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limit *South-Eastern Underwriters* was emphasized by Senator McCarran: "[W]e give to the States no more powers than those they previously had, and we take none from them." 91 Cong. Rec. 1442 (1945). *See also Western & Southern Life Insurance*, 451 U.S. at 653-54; *SEC v. National Securities, Inc.*, 393 U.S. 453, 459 (1969).

apply." *SEC v. National Securities, Inc.*, 393 U.S. 453, 459-60 (1969). Moreover, it flies in the face of 28 U.S.C.A. § 1334(b), enacted by Congress less than a year ago.[24] *See* p. 22 n.22 *supra.*

Even if the McCarran Act applies to legislation enacted under the Bankruptcy Clause, the Arkansas Supreme Court wrongly concluded that "[t]he Arkansas statute which authorizes the rehabilitation court to issue an injunction is a law enacted for 'the business of insurance' within the meaning of the McCarran-Ferguson Act." (App. A, 7a.) The Act's legislative history indicates that Congress did not intend to include injunctions issued by rehabilitation courts within the definition of the "business of insurance." The McCarran Act was based in large part on a bill and accompanying report submitted on behalf of the National Association of Insurance Commissioners ("NAIC"). *Royal Drug*, 440 U.S. at 221. The NAIC bill proposed to carve out from federal antitrust regulation seven specific anti-competitive practices of the insurance industry, 90 Cong. Rec. A4406 (1944), none of which is even remotely related to the rehabilitation of insolvent insurance companies. As ultimately enacted by Congress, the Act substituted the term "business of insurance" for the NAIC proposal in order to create an exemption that "is narrower than the bills which would have exempted specific practices." *Royal Drug*, 440 U.S. at 223 n.29.

This Court has held that the McCarran Act is directed only at intra-industry spreading of risk and ratemaking, and contractual and other matters directly related to the relationship between insurance companies and their policyholders. *Id.* at 215-16, 220-21; *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 127-29 (1982). The Court has been "reluctant to extend the [§ 1012(b)]

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[24] "Notwithstanding any Act of Congress that confers exclusive jurisdiction on [other courts], the district courts shall have original . . . jurisdiction of all civil proceedings arising under title 11...."

exemption to . . . parties 'wholly outside the insurance industry.'" *Pireno*, 458 U.S. at 129 (quoting *Royal Drug*, 440 U.S. at 231).

In fact, courts frequently have rejected the contention that state rehabilitation proceedings themselves constitute the "business of insurance." *See Royal Drug*, 440 U.S. at 217, 230 n.38 (many aspects of insurance regulated by state law, such as liquidation, are not the "business of insurance" but rather are the "business of insurance companies"); *Central States*, 600 F.2d at 677 (rejecting contention that McCarran Act authorized state rehabilitation court injunction against federal litigation); *Langdeau v. United States*, 363 S.W.2d 327, 330-31 (Tex. Civ. App. 1962) (state statute regulating insurance companies in insolvency proceedings did not regulate "business of insurance").

Indeed, in two cases involving application of the antitrust laws to insurance companies, this Court has rejected the Arkansas Supreme Court's sweeping contention that the rehabilitation proceeding itself constitutes the "business of insurance" because it attempts to ensure that the insurance companies will have sufficient assets to cover their anticipated liabilities. (See App. A, 7a.) In *Royal Drug*, 440 U.S. at 216, and *Pireno*, 458 U.S. at 131-32, insurance companies maintained that their activities were an "integral part" of the insurer-insured relationship because they affected the cost of premiums and the administration of benefits and directly involved the "reliability," "interpretation" and "enforcement" of the insurance contract. *Royal Drug* involved the antitrust implications of pharmacy provider agreements that singled out certain pharmacies as outlets for discount drug purchases by policyholders. *Pireno* concerned the antitrust implications of a peer review system where health insurers conditioned benefits for chiropractic treatment on the approval of a committee composed of members of a chiropractors association. This Court held that the activities were not the "business of insurance" be-

cause policyholders are "basically unconcerned" with the particular arrangements the company has to make to ensure its compliance with the terms of the insurance contract. *Royal Drug*, 440 U.S. at 214. *See Pireno*, 458 U.S. at 132.[25]

Like the agreement and procedures at issue in *Royal Drug* and *Pireno*, the Arkansas rehabilitation proceeding is nothing more than an attempt to bolster the financial condition of the insurance companies so as to make good on their policies. If the Arkansas position is allowed to stand, it will have serious implications beyond the scope of this proceeding because virtually everything will constitute the "business of insurance," including anything that reduces expenses or labor costs, for they would increase the asset pool available to pay insureds.

The Arkansas Supreme Court's parochial view is at odds with current federal law as expressed in decisions routinely applying federal statutes to insurance companies undergoing rehabilitation, even when the federal action would create uncertainty about the assets available for rehabilitation.[26] The reasoning of the Arkansas Supreme Court would undermine the jurisdiction of federal courts over a broad range of activities.[27]

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[25] *See also Hahn v. Oregon Physicians Serv.*, 689 F.2d 840, 842-43 (9th Cir. 1982) ("courts have consistently applied the narrow definition of 'the business of insurance' enunciated in *Royal Drug*"), *cert. denied*, 103 S. Ct. 3115 (1983); *Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 318 (D.C. Cir.) (*Royal Drug* has "significantly narrowed the scope of the term 'business of insurance' "), *cert. denied*, 459 U.S. 839 (1982).

[26] *See, e.g., Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Ins. Co.*, 600 F.2d 671, 676 (7th Cir. 1979) (despite state court injunction barring federal suits, federal court applied ERISA to insurance company undergoing rehabilitation); *Stoller v. Baldwin-United Corp.*, 1984 Fed. Sec. L. Rep. (CCH) ¶ 91,678, at 99,430 (S.D. Ohio 1984) (securities laws applied to insurance companies undergoing rehabilitation despite risk that adverse judgment would hinder rehabilitation plan).

[27] Federal courts have repeatedly taken a view in conflict with the Arkansas court, rejecting claims that the McCarran Act was

## CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue and the judgment and opinion of the Arkansas Supreme Court should be vacated or reviewed.

Respectfully submitted,

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DATED: March 21, 1985

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intended to bar litigants from asserting federal rights in federal court. *See, e.g., MacKey v. Nationwide Ins. Cos.*, 724 F.2d 419, 421 (4th Cir. 1984) (Fair Housing and Civil Rights Acts); *USLIFE Corp. v. U.S. Life Ins. Co.*, 560 F. Supp. 1302, 1308 (N.D. Tex. 1983) (patent infringement claims under Lanham Act); *Women in City Gov't United v. New York*, 515 F. Supp. 295, 303 (S.D.N.Y. 1981) (Title VII sex discrimination claims, noting that the "Act should not be applied indiscriminately to subsequent federal legislation, the overriding purpose of which is not the regulation of commerce but the protection of other important federal interests"); *Ben v. General Motors Acceptance Corp.*, 374 F. Supp. 1199, 1203 (D. Colo. 1974) (civil rights claims).

# 84-1488

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FILED
MAR 21 1985
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CLERK

No. 84-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

---

BALDWIN-UNITED CORPORATION
and D. H. BALDWIN COMPANY,
*Petitioners,*

v.

ROBERT M. EUBANKS, III, INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS,
*Respondent.*

---

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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## APPENDIX A

## SUPREME COURT OF ARKANSAS

---

No. 84-162

BALDWIN-UNITED CORPORATION
and D. H. BALDWIN COMPANY,
*Appellants,*

v.

LINDA N. GARNER, INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS,
*Appellee.*

---

Oct. 22, 1984

---

HUBBELL, Chief Justice.

Appellants Baldwin-United Corporation and D. H. Baldwin Company appeal from the circuit court's order which adopted a Plan of Rehabilitation proposed by appellee, the Arkansas Insurance Commissioner, and denied appellants' motion to amend the Plan. The Plan concerns three Arkansas insurance companies: National Investors Pension Insurance Company, National Investors Life Insurance Company and Mt. Hood Pension Insurance Company. All three companies are appellants' subsidiaries. Appellants argue two points on appeal. First, they assert that the circuit court erred in making a series of rulings about its jurisdiction which prevent appellants from asserting claims against their subsidiaries in any other forum. Second, appellants argue that the Plan of Rehabilitation is not fair and equitable because it will

compensate policyholders far beyond what they would have received had the insurance companies never encountered financial difficulties. We affirm.

Baldwin-United Corporation is the corporate parent of the Baldwin-United group of companies. D. H. Baldwin Company is a subsidiary of Baldwin-United. Two of the Arkansas insurance subsidiaries, National Investors Pension Insurance Company and National Investors Life Insurance Company, are direct subsidiaries of D. H. Baldwin. Mt. Hood Pension Insurance Company is an indirect subsidiary of Baldwin-United.

The Arkansas insurance companies' principal insurance product is a single premium deferred annuity (SPDA). An SPDA guarantees the purchaser the right to a deferred stream of annuity payments in exchange for the payment of a one-time premium. Interest is periodically credited to the policyholder's account at a specified crediting rate. The policyholder can withdraw principal and interest by surrendering the policy, by making periodic withdrawals, or by electing to receive annuity payments.

On July 13, 1983, the circuit court entered Orders of Rehabilitation concerning each of Appellants' Arkansas insurance subsidiaries, appointed the Arkansas Insurance Commissioner as Rehabilitator of the insurance companies, and ordered her to take possession of all the insurance companies' property and to propose a plan for their rehabilitation.

In its July 13, 1983 order, the court entered an injunction "restraining all persons and other legal entities" from "the making of claims or the commencement of further prosecution of any actions in law or equity or administrative [proceedings] except in this Court", and from "the making of any levy, garnishment or execution against any of the property, personal or real, of respondent or its assets or its policyholders."

On September 26, 1983, appellants entered reorganization proceedings under Chapter 11 of the Federal Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.* Those proceedings are pending in the United States Bankruptcy Court for the Southern District of Ohio.

On October 17, 1983, appellee submitted to the court below a proposed Plan of Rehabilitation. The proposed Plan sought to provide the Arkansas insurance companies, within 3½ years, with assets at least sufficient to support the amount of the accumulated value of their single premium annuities as of May 1, 1984 plus, at a minimum, an assured rate of interest from May 1, 1984 with the possibility of receiving a higher crediting rate from May 1, 1984.

Appellants intervened in these proceedings and filed a motion to amend the Plan. Appellants challenged: (1) the parts of the Plan which continued the July 13 injunction of actions against the insurance subsidiaries in any other forum and provided that no judgment obtained elsewhere would be paid until the rehabilitation ended and all policyholder claims had been satisfied; (2) the part of the Plan which subordinated all claims against the assets to the claims of the policyholders; and (3) the part of the Plan which proposed certain rates of interest for some of the options available to holders of single premium deferred annuities. The court held hearings concerning the proposed Plan and various motions to amend, and on March 23, 1984, the court approved the Plan of Rehabilitation substantially as proposed and denied appellants' motion to amend.

In addition to its ruling on the Plan, the court made three rulings concerning its purported power over all controversies relating to the insurance companies. First, the court found that it had exclusive jurisdiction to adjudicate all claims involving the property of the insurance subsidiaries:

> [T]he Court has exclusive jurisdiction of the [subsidiaries] and the assets of the [subsidiaries] and has exclusive jurisdiction with respect to the administration of the assets of the [subsidiaries] to determine the validity or invalidity of all claims against such assets.

Second, the court continued the injunction originally entered in its July 13 Rehabilitation Order:

> The injunctions issued by the Court on July 13, 1983 are hereby reaffirmed the same being reasonable and necessary to protect the jurisdiction of the Court . . . and all persons or other entities are hereby enjoined from the commencement, prosecution, or further prosecution of any suit, action, claim or proceedings against the [subsidiaries] and their assets or the Receiver other than in this Court except to the extent, if any, this Court grants it permission to do so upon written Orders entered hereafter upon good cause shown.

Finally, the court announced it would not recognize any judgment affecting the Arkansas insurance companies from any other court:

> No sale, assignment, transfer, hypothecation, lien, security interest, judgment, order, attachment, garnishment or other legal process of any kind or nature with respect to or affecting these [insurance companies] or their assets or the Receiver shall be effective or enforceable unless entered in this Court in accordance with [the injunction provision quoted above].

I.

Appellants claim that, beginning in 1981, they gave their Arkansas insurance subsidiaries cash, securities, and other assets for less than fair consideration. Appellants believe that they may be entitled to set aside these

transfers as fraudulent conveyances and preferential transfers under Bankruptcy Code §§ 544, 547, and 548. Although the record is silent as to the size or exact nature of their claims, appellants assert on appeal that the transfers could amount to hundreds of millions of dollars. Appellants have not presented any other claims other than those they claim might arise under the bankruptcy act.

Appellants contend that the circuit court erred in making a series of rulings concerning its purported jurisdiction which prevent appellants from presenting their fraudulent conveyance and preferential transfer claims in any forum other than the rehabilitation court. By these rulings appellants are enjoined both from bringing their claims in bankruptcy court and from petitioning the bankruptcy court to determine whether certain assets should be included in the bankruptcy estate. The bankruptcy court is also enjoined from attempting to exercise jurisdiction over assets which appellants assert might be determined to be part of appellants' bankruptcy estate. Appellants claim that Congress has given them the right to bring their claims in federal bankruptcy court and that the state court cannot impair that right. Appellants contend the central issue is whether the court can deny appellants their right to present their claims in a federal forum.

Arkansas has enacted a comprehensive statutory scheme dealing with impaired insurance companies. This scheme is designed to protect the interests of policyholders and to provide for the adjustment of the right of creditors and policyholders in the event of insolvency. This scheme expressly authorizes the issuance of injunctions. Ark. Stat. Ann. § 66-4804 (Repl. 1980) provides:

> The court may at any time during a proceeding under this chapter issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or

> waste of the assets of the insurer, or the commencement of prosecution of any actions . . . .

The injunction issued by the rehabilitation court does not exceed the court's statutory authority, nor do appellants so contend.

Appellants argue a Congressionally mandated right to pursue their claims in federal bankruptcy court. It is of prime significance, however, that insurance companies are not eligible to be debtors in bankruptcy. 11 U.S.C. § 109 (b) (2) and (d). Congress has thus decided that rehabilitation and liquidation of insurance companies should be left to the several states. By exempting state insurance liquidation and rehabilitation proceedings, Congress prevented bankruptcy courts from interfering with the rights of insureds protected by state regulations. See *In Re Equity Funding Corporation of America*, 396 F. Supp. 1266, 1275 (C.D. Cal. 1975).

Of even greater significance is the fact that Congress has expressly left the regulation of insurance to the states by its passage of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.* This act provides in pertinent part:

> The Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> * * * *
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the business of insurance . . . unless such Act specifically relates to the business of insurance.

The purpose of the McCarran-Ferguson Act was to preserve intact from any federal intrusion, existing and future state regulation of the insurance industry subject

only to the exceptions expressly provided. *Prudential v. Benjamin*, 328 U.S. 408, 420-30 (1946). The McCarran-Ferguson Act does not purport to make the states supreme in regulating all activities of insurance companies. Insurance companies may do many things which are subject to federal regulation, but when they are engaged in the business of insurance, the Act applies. *S.E.C. v. National Securities*, 393 U.S. 453, 459-60 (1969). When a state does act to regulate the insurance business, particularly in respect to the rights of policyholders, it is free from the intervention of Congress in the absence of a specific law concerning that matter.

Appellants assert that state rehabilitation proceedings are not business of insurance within the meaning of the McCarran-Ferguson Act. The focus of "business of insurance" is the relationship between the insurer and an insured, particularly the policy's reliability. Statutes aimed at protecting or regulating the relationship between an insurance company and a policyholder, directly or indirectly, are laws regulating the business of insurance. *S.E.C. v. National Securities*, at 460. The Plan of Rehabilitation protects over 300,000 policyholders throughout the United States by attempting to provide the Arkansas insurance companies with assets at least sufficient to support the full amount of the accumulated value of the annuities. Ark. Stat. Ann. § 66-4810 (Repl. 1980) provides that the order to rehabilitate a domestic insurer shall direct that the Commissioner take possession of the company's property and "conduct the business." The Arkansas statute which authorizes the rehabilitation court to issue an injunction is a law enacted for "the business of insurance" within the meaning of the McCarran-Ferguson Act. Ark. Stat. Ann. § 66-4804 (Repl. 1980).

The McCarran-Ferguson Act prohibits Congress from impairing any law enacted by a state for the business of insurance unless such congressional action specifically re-

lates to the business of insurance. Therefore, since the Bankruptcy Act does not specifically relate to the business of insurance, and indeed expressly excludes insurance companies from being debtors in bankruptcy, appellants cannot pursue their claims under the Bankruptcy Act once enjoined by a valid state injunction. If any meaning is to be given to the congressional exclusion of insurance companies from the Bankruptcy Act and the mandate of the McCarran-Ferguson Act, it must be that the determination of rights among an insurance company's creditors must be left to state proceedings.

We do not hold that the McCarran-Ferguson Act prohibits a person from making a claim in Bankruptcy against an insurance company under any circumstances. In this instance, however, an insurance company is being rehabilitated pursuant to a state statutory scheme, and the rehabilitation court found it necessary to enjoin other proceedings in order to secure an orderly rehabilitation. Therefore, the McCarran-Ferguson Act prevents the Bankruptcy Act from being used to invalidate or impair the Arkansas statutes. The appellants do not have an absolute right to pursue their claims in bankruptcy court.

The rehabilitation of these three insurance companies is of vital state concern. On July 13, 1983, the appellants joined in appellee's petition to seek an Order of Rehabilitation. The parties joined in this effort in order to protect the interests of the companies' assets, the companies' creditors, the policyholders, and the public at large. The over 300,000 policyholders affected by the rehabilitation and the appellants' bankruptcy proceedings are at a distinct economic disadvantage in the protection of their interests. An orderly rehabilitation of the three insurance companies may provide the policyholders the only opportunity to recover their investments. The rehabilitation court needs to be able to subject the companies and those asserting claims to a coherent and compulsive legal

process, or it would be severely constrained in its efforts. The rehabilitation court's injunction does not leave the appellants without remedies. They may petition the court for relief from the injunction or litigate their claims in rehabilitation court. The trial court did not err in finding that in order to secure an economical, efficient, and orderly rehabilitation, it was essential not only that title and custody to the insurance companies' assets be entrusted to a single court, but that all claims to those assets be adjudicated in that same court.

II.

Appellants' final argument is that the approved Plan of Rehabilitation is contrary to law and is not fair or equitable to the extent it will compensate policyholders far beyond what they would have received had the subsidiaries never encountered financial difficulties.

The Rehabilitation Plan offers policyholders several options with respect to their policies. Options A and B offer policyholders a crediting rate of the average of first year crediting rates offered by other insurers on comparable policies plus .5%. The .5% bonus is to provide compensation to policyholders for the difficulties encountered in the rehabilitation process. The court denied appellants' motion to amend the Plan to base the crediting rate on the average rate offered by other issuers which are not in their first year guaranteed period plus .5%.

Appellants assert that first year rates guaranteed during the first year are artificially high to induce sales. After the guaranteed period, these high rates are reduced significantly to reflect true market conditions. Appellants assert that unless the court's order is reversed the policyholders will receive a perpetual first year guaranteed rate throughout rehabilitation.

The court found the Plan "is fair, just, and equitable to all interested persons, creditors, claimants, and enti-

ties affected by the Plan." The standard of review is whether the trial court's finding is clearly erroneous. ARCP Rule 52.

The policies sold by the appellants' insurance companies had a one year minimum crediting rate that was substantially higher than the interest rate guaranteed in subsequent years. However, significant reduction in the rate would have allowed the policyholders to surrender their policies and receive their full policy accumulation, plus the high first year rates. The policyholders could then obtain a new first year rate from another insurance company. The record reflects that appellants' companies would have had to maintain high crediting rates to keep their business. Under the Plan of Rehabilitation the policyholders are locked in and cannot reinvest with another company. The Rehabilitation Plan's crediting rates have a reasonable basis, and the adoption of the rates is not clearly erroneous.

Affirmed.

## APPENDIX B

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

---

No. 83-5017
(Consolidated)

IN THE MATTER OF THE REHABILITATION OF NATIONAL INVESTORS PENSION INSURANCE COMPANY, NATIONAL INVESTORS LIFE INSURANCE COMPANY and MT. HOOD PENSION INSURANCE COMPANY

LINDA GARNER, INSURANCE COMMISSIONER FOR THE STATE OF ARKANSAS and REHABILITATOR,
*Petitioner*

vs.

NATIONAL INVESTORS PENSION INSURANCE COMPANY, NATIONAL INVESTORS LIFE INSURANCE COMPANY and MT. HOOD PENSION INSURANCE COMPANY,
*Respondents*

---

[Filed Mar. 23, 1984]

---

## ORDER ADOPTING PLAN OF REHABILITATION

The Court has considered the Plan of Rehabilitation proposed by Linda Garner, Insurance Commissioner and Rehabilitator, in the above-styled and numbered cause (the "Plan") along with objections thereto and other related motions and matters respecting the above-named insurance companies (the "Companies"). The matter

having come on for hearing before the Court from January 9, 1984 to January 13, 1984, the Court having carefully considered the Plan, the applicable law, the evidence, comments, suggestions, objections thereto and testimony adduced during the said hearing along with the motions, arguments and briefs submitted, the Court finds as follows:

* * * *

3. That the Court has exclusive jurisdiction of the Companies and the assets of the Companies and has exclusive jurisdiction with respect to the administration of the assets of the Companies to determine the validity or invalidity of all claims against such assets. The Court has continuing jurisdiction with respect to this matter. All assets of the Companies, including, but not limited to, those existing on July 13, 1983 or acquired thereafter and including, but not limited to, those described in Attachment No. 1 to this Order, should be ordered to be subject to the provisions of the Plan as hereinafter set forth and/or hereafter amended or modified (in accordance with the procedures provided herein below), dedicated thereto and pooled in accordance with the provisions thereof. Further, the Rehabilitator should be appointed as Receiver and directed to rehabilitate the Companies in accordance with the Plan. Title to all assets of the Companies should be vested in the Receiver and the Receiver should be authorized to deal with same in her own name as Receiver . . . .

* * * *

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

* * * *

K. The injunctions issued by the Court on July 13, 1983 are hereby reaffirmed the same being reasonable and necessary to protect the jurisdiction of this Court, and the Plan and to enable the Court to conduct these proceedings pursuant to the statutory provisions for such proceedings, and all persons or other entities are hereby

enjoined from the commencement, prosecution, or further prosecution of any suit, action, claim or proceedings against the Companies and their assets or the Receiver other than in this Court except to the extent, if any, this Court grants its permission to do so by written Orders entered hereafter upon written motion and upon good cause shown. No sale, assignment, transfer, hypothecation, lien, security interest, judgment, order, attachment, garnishment or other legal process of any kind or nature with respect to or affecting these Companies or their assets or the Receiver shall be effective or enforceable unless entered in this Court in accordance with this paragraph.

* * * *

IT IS SO ORDERED this 23rd day of March, 1984.

/s/ Perry V. Whitmore
Circuit Judge

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

---

No. 83-5017
(Consolidated)

IN THE MATTER OF THE REHABILITATION OF NATIONAL INVESTORS PENSION INSURANCE COMPANY, NATIONAL INVESTORS LIFE INSURANCE COMPANY and MT. HOOD PENSION INSURANCE COMPANY

LINDA GARNER, INSURANCE COMMISSIONER FOR THE STATE OF ARKANSAS and REHABILITATOR,
*Petitioner*

vs.

NATIONAL INVESTORS PENSION INSURANCE COMPANY, NATIONAL INVESTORS LIFE INSURANCE COMPANY and MT. HOOD PENSION INSURANCE COMPANY,
*Respondents*

---

# PROPOSED PLAN OF REHABILITATION FOR NATIONAL INVESTORS PENSION INSURANCE COMPANY NATIONAL INVESTORS LIFE INSURANCE COMPANY MT. HOOD PENSION INSURANCE COMPANY ("ARKANSAS COMPANIES") NATIONAL EQUITY LIFE INSURANCE COMPANY, INC. S&H LIFE INSURANCE COMPANY UNIVERSITY LIFE INSURANCE COMPANY OF AMERICA ("INDIANA COMPANIES")

(Corrected Copy of All Supplements Filed Through January 5, 1984)

---

* * * *

Attachment Number 2 to Court Order dated March 23, 1984.

* * * *

C. Injunction Against Litigation and Claims

5.6 The Rehabilitation Courts have entered Orders enjoining the commencement, prosecution, or further prosecution of substantially all material suits, actions or proceedings against the Companies or the Rehabilitators, except as a part of the rehabilitation proceedings or with the permission of the respective Rehabilitation Court to institute or prosecute such suit, action, or proceeding elsewhere. The Arkansas Rehabilitation Court's injunction was contained in the Orders of Rehabilitation entered on July 13, 1983. The Indiana Rehabilitation Court's injunctive Order was entered on July 14, 1983.

5.7 The Rehabilitation Courts' injunctions should continue in all respects for the Term of the Plan. . . .

* * * *

## APPENDIX C

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

---

No. 83-5018

IN the MATTER of the REHABILITATION of THE NATIONAL INVESTORS LIFE INSURANCE COMPANY

LINDA N. GARNER, INSURANCE COMMISSIONER for the STATE OF ARKANSAS
*Petitioner*

vs.

THE NATIONAL INVESTORS LIFE INSURANCE COMPANY
*Respondent*

---

## ORDER OF REHABILITATION

* * * *

6. An injunction should be and is hereby issued restraining all persons and other legal entities, except the Commissioner, from: transacting the business of Respondent herein except as directed by the Commissioner, or from the waste or disposition of Respondent assets and property, real or personal, of every kind or nature; the payment of any sums to any parties by or on behalf of Respondent, except as authorized by the Commissioner pursuant to the provisions of paragraph 5 hereof; interfering with the Commissioner in the conduct of the business of Respondent and of all matters which are the subject of this proceeding; the making of claims or the commencement of or further prosecution of any actions in law or equity or administrative except in this Court; the obtaining of any preferences, judgment, attachments

or other liens against any of the property, personal or real, of the Respondent; commencing or continuing any action in the nature of an attachment, garnishment or execution against any of the property, personal or real, of Respondent; the making of any levy, garnishment or execution against any of the property, personal or real, of Respondent or its assets or its policyholders; making of any sale or deed for non-payment of taxes or assessments that would lessen the assets of the Respondent or the value thereof; withholding from the Commissioner or removing or destroying any of the books, accounts, documents, computer data, software or hardware, or other records related to the business, assets or affairs of the Respondent; or removing any assets of the Respondent from this State or from the various places of business or record repositories of Respondent wherever located, (except in conformity with the written instructions of the Commissioner), all pending further orders of this Court.

* * * *

IT IS SO ORDERED this 13th day of July, 1983.

/s/ Perry V. Whitmore
Circuit Judge

APPROVED AS TO FORM
AND SUBSTANCE:

/s/ William C. Bethea
WILLIAM C. BETHEA
Deputy Arkansas Insurance Commissioner
For the Commissioner

/s/ Walter W. Davidson
WALTER W. DAVIDSON
For the Respondent

## APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

---

Consolidated Case No. 1-83-02495

Chapter 11

(Judge Newsome) Bankruptcy Judge

IN RE: BALDWIN-UNITED CORPORATION, D. H. BALDWIN COMPANY and BALDWIN-UNITED LEASING COMPANY,
*Debtors and Debtors-In-Possession*

---

ORDER RE REHABILITATION PROCEEDINGS

At Cincinnati, in said District, on December —, 1983.

National Investors Life Insurance Company, National Investors Pension Insurance Company and Mt. Hood Pension Insurance Company, all of which are affiliates of Baldwin-United Corporation ("Baldwin") and D. H. Baldwin Company ("DHB"), debtors and debtors-in-possession herein, are presently in proceedings in the Circuit Court of Pulaski County, Arkansas for rehabilitation (the "Arkansas Proceedings"). National Equity Life Insurance Company, Inc., S&H Life Insurance Company and University Life Insurance Company of America, all of which are affiliates of Baldwin and DHB, are presently in proceedings in the Circuit Court of Marion County, Indiana for rehabilitation (the "Indiana Proceedings").

The rehabilitators in the Arkansas and Indiana Proceedings have proposed a Plan of Rehabilitation. Sections

5.14 and 5.15 of the proposed plan purport to subordinate claims of Baldwin and DHB to the claims of policyholders. Baldwin, DHB and other affiliated companies may have claims against the insurance companies involved in the Arkansas and Indiana Proceedings. While Baldwin and DHB presently believe that a successful rehabilitation of those companies is in the best interest of the debtor estates, there is no assurance that a Plan of Rehabilitation will be approved on proper terms and, if approved, ultimately result in the return of those companies to Baldwin and its related entities.

Baldwin and DHB have initiated discussions with the rehabilitators with a view toward entering into an agreement that protects Baldwin's and DHB's rights against the companies involved in the Arkansas and Indiana Proceedings, while at the same time permitting the rehabilitations to proceed. To date, no agreement has been reached and comments on the proposed plan must be filed on or before December 19, 1983. As a result, at the December 14, 1983 Status Conference, counsel for Baldwin and DHB orally asked this Court for an order authorizing the debtors to take whatever actions they deem necessary in connection with the Arkansas and Indiana Proceedings to protect the interests of the debtor estates.

Based upon the foregoing, and good cause appearing therefore, it is hereby ORDERED, ADJUDGED and DECREED:

That Baldwin and DHB be, and they hereby are, authorized to appear and/or intervene in the Arkansas and Indiana Proceedings and to take whatever actions they deem necessary and appropriate to protect the interests of the debtor estates. No such appearance or intervention shall be deemed to constitute a waiver of any claim or defense Baldwin or DHB may have in this Court with respect to any of the insurance companies involved in those proceedings or a waiver of the jurisdiction of

this Court to determine any claims between Baldwin and DHB and the companies involved in the Arkansas and Indiana Proceedings.

/s/ Randall J. Newsome
RANDALL J. NEWSOME
Bankruptcy Judge

(Entered December 14, 1983)

## APPENDIX E

# SETTLEMENT AGREEMENT

[certain confidential information has been expunged]

Settlement Agreement:
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| 4.9 | Headings | [48a] |
| 4.10 | Counterparts | [48a] |
| 4.11 | Tolling of Statutes of Limitations | [48a] |
| Exhibit A. | Affiliate Assets | [50a] |
| Exhibit B. | Excluded MGIC Assets | [52a] |

## *SETTLEMENT AGREEMENT*

This Settlement Agreement ("Agreement") is made and entered into as of January 4, 1985, by and between LINDA N. GARNER ("Garner"), as Rehabilitator and Receiver of National Investors Life Insurance Company, National Investors Pension Insurance Company and Mt. Hood Pension Insurance Company (collectively, the "Arkansas Companies"), and not in her individual capacity, DON H. MILLER ("Miller" and, together with Garner, the "Rehabilitators"), as Rehabilitator of National Equity Life Insurance Company, Inc., S & H Life Insurance Company and University Life Insurance Company of America (collectively, the "Indiana Companies"), and not in his individual capacity, BALDWIN-UNITED CORPORATION, a Delaware corporation ("Baldwin-United"), and D.H. BALDWIN COMPANY, an Ohio corporation and a wholly owned subsidiary of Baldwin-United ("D.H. Baldwin" and, together with Baldwin-United and with any successor to D.H. Baldwin and to Baldwin-United, the "Baldwin Companies").

### *WITNESSETH:*

WHEREAS, Baldwin-United and D.H. Baldwin are debtors in possession in Consolidated Case No. 1-83-02495 pending before the United States Bankruptcy Court for the Southern District of Ohio, Western Division (the "Bankruptcy Court" and the "Bankruptcy Case"); and

WHEREAS, the Arkansas Companies are presently in proceedings for rehabilitation in that certain action styled *In the matter of the Rehabilitation of National Investors Pension Insurance Company, National Investors Life Insurance Company and Mt. Hood Pension Insurance Company, Linda Garner, Insurance Commissioner for the State of Arkansas and Rehabilitator v. National Investors Pension Insurance Company, National Investors Life Insurance Company, and Mt. Hood Pension Insurance Company,* Case No. 83-5017 (the "Arkansas Rehabilitation

Proceeding") pending before the Circuit Court of Pulaski County, Arkansas (the "Arkansas Court"); and the Indiana Companies are presently in proceedings for rehabilitation in that certain action styled *Don H. Miller, as the Insurance Commissioner of the Department of Insurance of the State of Indiana v. National Equity Life Insurance Company, Inc., S & H Life Insurance Company and University Life Insurance Company of America*, Case No. C83-1664 (the "Indiana Rehabilitation Proceeding") pending before the Marion Circuit Court, State of Indiana (the "Indiana Court"); and

WHEREAS, the Rehabilitators and the Baldwin Companies desire (i) to settle all claims the Rehabilitators have asserted or may assert against the Baldwin Companies and their subsidiaries and affiliates and all claims the Baldwin Companies have asserted or may assert against the Rehabilitators, the Arkansas Companies and the Indiana Companies; and (ii) to facilitate the rehabilitation of the Arkansas Companies and the Indiana Companies and the reorganization of the Baldwin Companies.

NOW, THEREFORE, in consideration of the mutual agreements herein contained, the Rehabilitators and the Baldwin Companies agree as follows:

## ARTICLE I

## DEFINITIONS

For all purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires:

1.1 *"Adjusted Base Payment"* means the aggregate of the Base Payment as increased and/or decreased by the following required adjustments:

(i) The Base Payment shall be increased by an amount equal to 50% of the amount, if any, by which the Net Proceeds from the sale of Empire

or Baldwin Enterprises, Inc., exceed $65,000,000. The Base Payment shall be decreased by an amount equal to 50% of the amount, if any, by which $65,000,000 exceeds the Net Proceeds from the sale of Empire or Baldwin Enterprises, Inc.;

* * * *

(iv) In the event the Proceeds from the sale of MGIC Assets exceed $875,000,000 but are less than or equal to $1,056,750,000, the Base Payment shall be increased by an amount equal to 60% of the amount by which the Proceeds from the sale of MGIC Assets exceed $875,000,000. In the event the Proceeds from the sale of MGIC Assets exceed $1,056,750,000, the Base Payment shall be increased by an amount equal to $109,050,000 plus 80% of the amount by which such Proceeds exceed $1,056,750,000. The Base Payment shall be decreased by an amount equal to 60% of the amount, if any, by which $875,000,000 exceeds the Proceeds from the sale of MGIC Assets. The parties further agree that the amounts paid, if any, to the Balunit Banks or the banks who are lenders in connection with the "MGIC revolver," regardless of when paid, shall not be deducted from the Proceeds from the sale of the MGIC Assets in calculating the amounts due pursuant to the provisions of this subparagraph (iv) or in calculating the Adjusted Base Payment or the Minimum Payment, subject, however, to the provisions of subparagraph (v) and Section 3.5 below;

* * * *

(vi) The Base Payment shall be increased by the amount of investment income allocable thereto as determined by Section 3.7 hereof.

1.2 *"Affiliate Assets"* means the assets in the possession of the Arkansas Companies and the Indiana Companies listed on Exhibit A hereto.

1.3 *"Baldwin Consolidated Group"* means the Baldwin Companies and those subsidiaries and affiliates that are or have been consolidated with the Baldwin Companies in the consolidated income tax returns filed by the Baldwin Companies with the Service.

* * * *

1.6 *"Bankruptcy Code"* means Title 11 of the United States Code.

1.7 *"Base Payment"* means the amount of $170,000,000.

1.8 *"Brokers"* means the brokers, dealers and other entities that directly or indirectly sold single premium deferred annuity policies issued or reinsured by the Arkansas Companies or the Indiana Companies.

1.9 *"Closing Date"* has the meaning set forth in Section 3.2 hereof.

1.10 *"Disclosure Statement"* means the statement or statements required to be filed with and approved by the Bankruptcy Court pursuant to Section 1125 of the Bankruptcy Code.

1.11 *"Empire"* means The Empire Savings, Building & Loan Association of Denver, Colorado, a subsidiary of the Baldwin Companies, and its assets and subsidiaries.

1.12 *"Federal Tax Payment"* means the aggregate amount of the payment or payments, net of re-

funds received and refunds credited or applied against deficiencies, made to the Service in satisfaction and settlement of the Tax Liabilities for all taxable years through the year ended December 31, 1984.

1.13 *"Minimum Payment"* means an amount equal to the greater of (i) $145,000,000 decreased by an amount equal to

or (ii) $120,000,000.

1.14 *"MGIC Assets"* means all the assets of MGIC Investment Corporation, a Wisconsin corporation, and its subsidiaries, but excluding those assets listed in Exhibit B hereto.

1.15 *"Net Proceeds"* means Proceeds net of all valid liens, encumbrances or other claims (but not liens, encumbrances or other claims of creditors of the Baldwin Companies) against the entities or assets being sold which are required to be paid prior to the distribution of such Proceeds to the Rehabilitators and/or the Baldwin Companies.

1.16 *"Non-Affiliate Assets"* means all assets of the Arkansas Companies and the Indiana Companies other than the Affiliate Assets.

1.17 *"Proceeds"* means the aggregate cash and other proceeds of the sale of: (i) Baldwin Enterprises, Inc. or Empire or their assets, and/or (ii) the MGIC Assets, and/or (iii) Foremost-Baldwin Partners, and/or (iv) any of the Affiliate Assets (whether heretofore or hereafter sold), as required by the context, net of customary closing costs, fees and commissions, including, but not limited to, legal and accounting fees and disbursements, fees of brokers, finders and investment bankers, and all state and local taxes and transfer fees.

* * * *

1.19 *"Reorganization Plan"* means any plan and all plans of reorganization for the Baldwin Companies filed in the Bankruptcy Court pursuant to Sections 1121 *et seq.* of the Bankruptcy Code.

1.20 *"Service"* means the United States Internal Revenue Service and/or the United States Department of the Treasury.

1.21 *"SPDA Enhancement Plan"* means any plan or plans as may be developed and implemented to facilitate the Arkansas Rehabilitation Proceeding and the Indiana Rehabilitation Proceeding, which may include the assigment, pledge, or other transfer in whole or in part of legal or beneficial title to the Non-Affiliate Assets to The Metropolitan Life Insurance Company or another entity or entities, and pursuant to which the rights of SPDA Policyholders are enhanced.

1.22 *"SPDA Policyholders"* means the holders of single premium deferred annuity policies and other policies issued or reinsured by any of the Arkansas Companies or the Indiana Companies.

1.23 *"Special Accounts"* has the meaning set forth in Section 3.6 hereof.

1.24 *"State Guaranty Funds"* means those instrumentalities of state governments that have or may have obligations to pay or guarantee payments to SPDA Policyholders.

1.25 *"Tax Liabilities"* means all unpaid federal income tax liabilities, as computed through the date of payment, of (a) the Baldwin Consolidated Group, as presently or previously constituted, for all taxable periods and (b) all direct or indirect current or former subsidiaries and affiliates, including but not limited to the SPDA Group, of the Baldwin Companies, or either of them, for all taxable periods for

which such subsidiaries or affiliates were not includable in the Baldwin Consolidated Group, as presently or previously constituted, *provided, however,* that unpaid income tax liabilities (and associated interest and penalties) of former subsidiaries and affiliates for such taxable periods shall be disregarded if and to the extent that the Baldwin Companies (and their current subsidiaries and affiliates, including but not limited to the SPDA Group, as of the date hereof) have no liability for, or are not chargeable in respect of, such unpaid federal income tax liabilities (and associated interest and penalties).

## ARTICLE II

## SPDA ENHANCEMENT PLAN

2.1 *Enhancement Plan Facilitation.* Subject to the provisions of Section 2.3 hereof, and in order to facilitate the development and implementation of an SPDA Enhancement Plan:

(a) *Non-Affiliate Assets.* The Baldwin Companies do hereby assign and release, in favor of the Rehabilitators, their successors and assigns, any and all right, title and interest they or their subsidiaries have in and to the Non-Affiliate Assets.

(b) *IRS Settlement.* With the cooperation of the Rehabilitators, the Baldwin Companies shall: (i) utilize their best efforts (x) to negotiate with the Service or to effect through litigation a reasonable settlement or other resolution of all Tax Liabilities through the taxable year ended December 31, 1984, and (y) to ensure that the Tax Liabilities shall not be satisfied from the Non-Affiliate Assets or asserted against the Rehabilitators, the Arkansas Companies or the Indiana Companies, or against any third party to whom the Non-Affiliate Assets or any portion thereof may hereafter be transferred by the

Rehabilitators; or, if the Baldwin Companies are unable to obtain a satisfactory resolution of the Tax Liabilities through the taxable year ended December 31, 1984, (ii) attempt to obtain an agreement from the Service or a judgment that all Tax Liabilities shall be satisfied from assets other than the Non-Affiliate Assets and that any transfer of the Non-Affiliate Assets shall not result in a claim for Tax Liabilities against the Rehabilitators, the Arkansas Companies or the Indiana Companies, or against any third party to whom the Non-Affiliate Assets or any portion thereof may hereafter be transferred by the Rehabilitators. In connection with the Baldwin Consolidated Group, (i) the Baldwin Companies shall have control over all negotiations with and any litigation against the Service and (ii) the Baldwin Companies shall have complete and final authority to settle and compromise or not to settle and compromise all Tax Liabilities with the Service. The Rehabilitators shall have the right to participate in the negotiations with or any litigation against the Service as necessary or appropriate in the discharge of their statutory duties and the Baldwin Companies shall keep the Rehabilitators advised of the status of all tax negotiations with the Service provided for in this Section 2.1(b).

(c) *Tax Consolidation.* The Rehabilitators shall not cause the deconsolidation of National Investors Pension Insurance Company, National Equity Life Insurance Company, Inc., S & H Life Insurance Company or Balunit, Inc. from the Baldwin Consolidated Group for federal income tax purposes until (if at all) the later of (i) the tax year following the tax year in which substantially all of the losses from the sale of the MGIC Assets are recognized or (ii) January 1, 1986. Consistent with their statutory duties, the Rehabilitators shall take all reasonable action necessary to ensure that all such companies remain

part of the Baldwin Consolidated Group during such periods. Without limiting the generality of the foregoing, the Rehabilitators, the Arkansas Companies and the Indiana Companies shall give any consents and shall execute, seal, file and deliver any documents, instruments, motions, notices or agreements reasonably deemed prudent or necessary by the Baldwin Companies to implement the purpose and intent of this Section 2.1(c). Notwithstanding the foregoing provisions of this Section 2.1(c) of any other provision of this Agreement, the Rehabilitators shall have and hereby retain the right to cause any of the Indiana Companies or the Arkansas Companies that do not insure or reinsure risks including life contingencies to assume such risks commencing no earlier than January 2, 1985; *provided, however,* that consistent with their statutory duties, the Rehabilitators shall nevertheless take all reasonable action necessary to ensure that Balunit, Inc. and B-U Acquisition Corporation remain consolidated for tax purposes with the Baldwin Companies until the later of the periods described in clauses (i) and (ii) of this Section 2.1(c).

(d) *SPDA Releases.* Any SPDA Enhancement Plan and any rehabilitation plan or plans relating to the Arkansas Companies or the Indiana Companies that incorporate an SPDA Enhancement Plan shall require (i) that the Brokers and State Guaranty Funds shall release the Baldwin Companies, their subsidiaries and their present directors and officers from claims and liabilities to the same extent that, and on terms no less favorable than, such Brokers or State Guaranty Funds receive releases from SPDA Policyholders or are otherwise released from liability, and (ii) that all SPDA Policyholders who elect to participate in such SPDA Enhancement Plan shall also release the Baldwin Companies, their subsidiaries and their present directors and officers

to the same extent that, and on terms no less favorable than, such SPDA Policyholders release Brokers or State Guaranty Funds. Such required releases in favor of the Baldwin Companies, their subsidiaries and their present directors and officers shall be provided to the Baldwin Companies forthwith upon the receipt of such releases by the Rehabilitators and/or the Indiana Court or the Arkansas Court.

2.2 *Tax Sharing Agreement.* The Baldwin Companies and the Rehabilitators shall negotiate and execute a tax sharing agreement. A copy of said tax sharing agreement shall be attached to this Agreement as Exhibit C on or before February 21, 1985. In the event that a tax sharing agreement has not been executed and attached by February 21, 1985, this Agreement in its entirety is terminable upon the giving of written notice pursuant to Section 4.6 by either the Rehabilitators or the Baldwin Companies.

2.3 *Court Approvals; Binding Agreement.* The agreements of the Baldwin Companies and the Rehabilitators set forth in this Article II are subject to and conditioned upon the entry of orders by each of the Arkansas Court, the Indiana Court and the Bankruptcy Court approving or authorizing this Agreement. The parties shall forthwith petition these courts for the entry of such orders. Upon the entry of all such orders, (i) the Baldwin Companies shall be bound by the terms and agreements set forth in Sections 2.1(a) and 2.1(b)(i)(x) regardless of whether an SPDA Enhancement Plan or a Reorganization Plan is approved or confirmed or whether Article III hereof is terminated because the Minimum Payment is not made or otherwise and, (ii) if there is an SPDA Enhancement Plan, the Baldwin Companies and the Rehabilitators shall be bound by all of the terms and agreements set forth in this Article II regardless of whether a Reorganization Plan is approved or confirmed or whether Article III hereof is terminated because the Minimum

Payment is not made or otherwise. In addition, the Baldwin Companies shall be bound by the terms and agreements set forth in Section 2.1(b)(i)(y) and 2.2 and the Rehabilitators shall be bound by the terms and agreements set forth in Sections 2.1(c) and 2.2 if Article III of this Agreement is not terminated and a Reorganization Plan is confirmed in which the claims in the Bankruptcy Case of the SPDA Policyholders, the State Guaranty Funds and the Brokers are disallowed or withdrawn, resulting in no payment by the Baldwin Companies with respect to such claims.

## ARTICLE III

## SETTLEMENT

3.1 *Filing of Reorganization Plan.* As soon as practicable following the entry of the orders contemplated in Section 2.3 hereof, the Baldwin Companies shall prepare and file a Reorganization Plan and Disclosure Statement that resolve the claims of the Rehabilitators, the objections and counterclaims of the Baldwin Companies and all disputes between the Baldwin Companies and the Rehabilitators, which Reorganization Plan shall be consistent with and shall incorporate the provisions of this Article III. The Reorganization Plan and Disclosure Statement shall provide for the entry of a confirmation order no later than January 15, 1986 and an effective date no later than 30 days after the date an order confirming such Reorganization Plan is entered, irrespective of any pending appeals of such order unless a stay has been entered.

3.2 *Transactions to be Effected on the Closing Date.* On a date which is as soon as practicable following the time when the last of the conditions set forth in Section 3.3 hereof shall have been fulfilled (or waived in writing) and, in any event, no later than forty-five (45) days following the date on which the last of such conditions has

been fulfilled or waived (such date is referred to herein as the "Closing Date"), the following simultaneous transactions shall occur:

(a) *The Payment of Adjusted Base Payment.* On the Closing Date, the Baldwin Companies shall pay (or cause to be paid) in immediately available funds to the Rehabilitators or their assignees, and the Rehabilitators or their assignees shall accept, the Adjusted Base Payment (or the Minimum Payment if the Baldwin Companies shall have elected, pursuant to Section 3.3(h) hereof, to pay the Minimum Payment even though the Adjusted Base Payment does not equal or exceed the Minimum Payment) in the form of a disbursement from one or more of the Special Accounts described in Section 3.6 hereof or, at the election of the Baldwin Companies, from other Baldwin Companies' accounts; *provided, however,* that in the event all of the conditions set forth in Section 3.3 hereof have been fulfilled other than the sale of Baldwin Enterprises, Inc. or Empire, the Baldwin Companies shall have the right pursuant to Section 3.3(d) hereof to pay (or cause to be paid) the Minimum Payment to the Rehabilitators or their assignees, and the Rehabilitators or their assignees shall be obligated to accept such Minimum Payment on the Closing Date and proceed with the transactions contemplated by this Section 3.2; and *provided further, however,* that the Baldwin Companies shall pay the balance, if any, of the Adjusted Base Payment within twenty (20) days after the date on which Baldwin Enterprises, Inc. or Empire is sold. For purposes of determining the Adjusted Base Payment in the event any of the Net Proceeds from the sale of MGIC assets, Empire or Baldwin Enterprises, Inc. and/or Foremost-Baldwin Partners are in the form of assets other than cash on the Closing Date, the Rehabilitators and the Baldwin Companies shall

negotiate in good faith to establish the fair market value of such assets as of that date.

(b) *Assignment of the Affiliate Assets.* On the Closing Date, the Rehabilitators, the Arkansas Companies and the Indiana Companies shall assign, sell, transfer, convey and release to the Baldwin Companies all right, title and interest of the Rehabilitators, the Arkansas Companies and the Indiana Companies in and to the Affiliate Assets or the proceeds thereof, including all right, title and interest in the excess of the Net Proceeds (plus investment income) above the sum of the Adjusted Base Payment and the amount allocable to the Rehabilitators pursuant to Section 3.2(d) hereof. Upon such assignment, sale, transfer, conveyance and release, the Rehabilitators shall supply orders of the Indiana Court and/or the Arkansas Court to the effect that the Affiliate Assets shall be free and clear of all liens, claims and encumbrances of the Rehabilitators, the Arkansas Companies and the Indiana Companies, or of those claiming through the Rehabilitators, and such release shall include a release from the Rehabilitators, the Arkansas Companies and the Indiana Companies of any claims or causes of action which they may have against or relating to all companies the common stock of which is listed on Exhibit A hereto and the direct and indirect subsidiaries of those companies (other than claims or causes of action against or relating to the MGIC Investment Corporation Debenture, the direct and indirect subsidiaries of National Equity Life Insurance Company, other than Foremost-Baldwin Partners, and the direct and indirect subsidiaries of University Life Insurance Company of America). Unless and until this Agreement is terminated pursuant to Section 3.8 hereof or otherwise, the Rehabilitators shall not cause or allow any

such company or subsidiary to be assigned, conveyed or otherwise transferred to any entity other than the Indiana Companies or the Arkansas Companies without the prior written consent and approval of the Baldwin Companies. In the event the Rehabilitators assign, sell, transfer or otherwise dispose of any of the Affiliate Assets, or any interest (except for the MGIC Investment Corporation Debenture) in the companies the common stock of which is listed on Exhibit A hereto or the direct and indirect subsidiaries of those companies (except for the direct and indirect subsidiaries of National Equity Life Insurance Company, other than Foremost-Baldwin Partners, and the direct and indirect subsidiaries of University Life Insurance Company of America) to an entity other than the Indiana Companies or the Arkansas Companies, they shall deposit the Proceeds or Net Proceeds, as the case may be, in a Special Account pursuant to Section 3.6 hereof. On the Closing Date, the Rehabilitators, the Arkansas Companies and the Indiana Companies shall execute, seal, file and deliver any documents, stock powers, endorsements, assignments, instruments or other writings reasonably deemed prudent or necessary by the Baldwin Companies to effect the transactions contemplated by this Section 3.2(b).

(c) *Releases.* On the Closing Date, the Baldwin Companies and the Rehabilitators shall execute and exchange written releases in the form attached hereto as Exhibit D, releasing and waiving any and all claims and counterclaims which the Baldwin Companies, on the one hand, and the Rehabilitators, the Arkansas Companies and the Indiana Companies, on the other hand, may have against one another.

(d) *Proceeds of Foremost-Baldwin Partners.* On the Closing Date the Baldwin Companies and the Rehabilitators shall each receive fifty percent (50%)

of the Net Proceeds from the sale or other disposition of Foremost-Baldwin Partners together with fifty percent (50%) of any income from the investment of the Proceeds or Net Proceeds, as the case may be, of such sale or disposition.

(e) *Simultaneous Closing.* The respective obligations of the Rehabilitators and the Baldwin Companies to perform and consummate the transactions set forth in Section 3.2(a) through (d) above are conditioned upon the simultaneous occurrence of all such transactions.

3.3 *General Conditions.* The agreements, obligations and undertakings of the Baldwin Companies under Section 3.1 hereof are subject to the fulfillment of the conditions set forth in subsection 3.3(a) hereof only; the agreements, obligations and undertakings of the Rehabilitators and the Baldwin Companies under Section 3.2 hereof are subject to the fulfillment of all of the following conditions:

(a) *Court Approvals.* The Arkansas Court, the Indiana Court and the Bankruptcy Court shall all have entered orders approving and authorizing the terms of this Agreement;

(b) *Reorganization Plan Approval.* No later than January 15, 1986, the Bankruptcy Court shall have entered an order or orders confirming a Reorganization Plan pursuant to Section 1129 of the Bankruptcy Code, which Reorganization Plan shall include provisions consistent with and to the effect of Sections 3.1 and 3.2 hereof;

(c) *Sale of MGIC Assets.* All or substantially all of the MGIC Assets shall have been sold or otherwise converted to cash or other proceeds and paid to or otherwise distributed to Balunit, Inc., *provided, however,* that to the extent that an insubstantial portion

of such MGIC Assets have not been sold, the Rehabilitators and the Baldwin Companies may negotiate in good faith to determine the fair market value (on a liquidation or going concern basis, as appropriate) of such unsold assets for purposes of computing the Proceeds from the sale of MGIC Assets;

(d) *Sale of Empire.* Empire and its subsidiaries, or the assets thereof, shall have been sold (directly or through the sale of Baldwin Enterprises, Inc.) or otherwise converted to cash or other proceeds; *provided, however,* that in the event all of the other conditions set forth in this Section 3.3 have been fulfilled, the Baldwin Companies shall have the right upon not less than twenty (20) days prior written notice to the Rehabilitators to waive such condition by causing the Minimum Payment to be made to the Rehabilitators, as set forth in Section 3.2(a) hereof, and by undertaking in such written notice to cause the balance, if any, of the Adjusted Base Payment to be disbursed to the Rehabilitators from the Special Accounts set forth in Section 3.6 hereof within twenty (20) days after the date on which Empire or its assets (directly or through the sale of Baldwin Enterprises, Inc.) are sold;

(e) *Sale of Foremost-Baldwin Partners.* Foremost-Baldwin Partners, or the assets thereof, shall have been sold or otherwise converted to cash or other proceeds;

(f) *Settlement of Tax Liabilities.* The Baldwin Companies shall have entered into a settlement with the Service with respect to the Tax Liabilities or otherwise resolved the Tax Liabilities as contemplated by Section 2.1(b)(i) hereof;

(g) *Resolution of Balunit Banks' Claims.* All claims of the Balunit Banks against Balunit, Inc. and/or the MGIC Assets shall have been finally

resolved, whether pursuant to a final and binding settlement agreement with the Balunit Banks or pursuant to final and binding adjudication of such claims; and

(h) *Minimum Payment.* The Adjusted Base Payment shall equal or exceed the Minimum Payment or the Baldwin Companies shall have elected, in their sole discretion, to pay the Minimum Payment even though the Adjusted Base Payment does not equal or exceed the Minimum Payment.

3.4 *Cooperation.* Until the termination of this Agreement pursuant to Section 3.8 hereof or otherwise, the Rehabilitators and the Baldwin Companies shall cooperate in good faith and exercise their respective best efforts to achieve the satisfaction of the requirements and conditions contained in Sections 3.1 and 3.3 hereof and to effect the transactions set forth in Section 3.2 hereof. Without limiting the generality of the foregoing, the Rehabilitators and the Baldwin Companies, or all of them where appropriate, shall give any consents (and the Rehabilitators shall vote affirmatively for any Reorganization Plan which incorporates the provisions hereof) and shall execute, seal, file and deliver any documents, instruments or other writings reasonably deemed prudent or necessary to implement the provisions of this Agreement and shall take all such reasonable measures as may be prudent or necessary to secure at the earliest practicable date the approval and authorization of this Agreement and the transactions contemplated thereby by the Bankruptcy Court, the Arkansas Court and the Indiana Court and by any other required governmental authorities or regulatory agencies.

* * * *

3.6. *Special Accounts.* After the date of this Agreement, all Proceeds or Net Proceeds, as the case may be,

received prior to the Closing Date from the sale of the MGIC Assets, the sale of Baldwin Enterprises, Inc. or Empire or its assets, the sale of Foremost-Baldwin Partners or its assets, and from the sale of any other Affiliate Assets, regardless of whether any such Proceeds or Net Proceeds are received by the Baldwin Companies or any of their subsidiaries (including Balunit, Inc.) or by the Rehabilitators or the Arkansas Companies or the Indiana Companies, shall be subject to the provisions of this Section 3.6. All such Proceeds or Net Proceeds shall be deposited by the entity or entities receiving such Proceeds or Net Proceeds in a special, segregated income producing account with ———————— N.A., with a separate special account to be established for Proceeds or Net Proceeds arising from each of the MGIC Assets (when received by Balunit, Inc.), Baldwin Enterprises, Inc. or Empire or its assets, Foremost-Baldwin Partners or its assets, and the other Affiliate Assets (the "Special Accounts"). In elaboration, but not in limitation of the foregoing, the Rehabilitators and the Baldwin Companies shall cause any Proceeds or Net Proceeds from the sale of the MGIC Assets (when received by Balunit, Inc.) to be deposited by Balunit, Inc. in such a Special Account. No disbursements of principal or income shall be made prior to the Closing Date from any of the Special Accounts without the prior specific authorization of each such payment by the Rehabilitators, the Baldwin Companies, and the Bankruptcy Court; *provided, however,* that

> (i) funds in the Special Accounts may be invested at the direction of the Baldwin Companies in the following: (a) Certificates of Deposit insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation, (b) Federal Government Repurchase Agreements, (c) Securities issued by the Federal Government (or agencies thereof), (d) Commercial Paper which carries

the highest rating by Standard and Poors and Moodys and (e) Money Market Funds the portfolios of which consist primarily of securities of the type described in (a), (b), (c) and (d) above; and

(ii) funds in the Special Account relating to MGIC Assets Proceeds may be disbursed to the Balunit Banks upon the final settlement or adjudication of their claims against Balunit, Inc.

On the Closing Date, if the conditions set forth in Section 3.3 hereof have been fulfilled, the disbursements called for by Sections 3.2(a) and 3.2(d) hereof shall be made from the Special Accounts. Concurrent with the payment of the Adjusted Base Payment and the payment provided by Section 3.2(d) hereof to the Rehabilitators, all remaining funds in such Special Accounts shall be distributed to the Baldwin Companies or their designees.

3.7 *Allocation of Investment Income.* All Proceeds or Net Proceeds in the Special Accounts shall be invested as permitted by clause (i) of Section 3.6 hereof from the date such Proceeds or Net Proceeds are received until the date of payment to the Rehabilitators of the Adjusted Base Payment (in the case of Proceeds or Net Proceeds attributable to the MGIC Assets, Baldwin Enterprises, Inc. or Empire and other Affiliate Assets) or until the payments to the Rehabilitators and the Baldwin Companies pursuant to Section 3.2(d) hereof (in the case of Proceeds or Net Proceeds attributable to Foremost-Baldwin Partners). The Adjusted Base Payment shall be increased by an amount equal to the product of the total income earned from investing the Proceeds or Net Proceeds, excluding those Proceeds or Net Proceeds attributable to Foremost-Baldwin Partners, from the date or dates such Proceeds or Net Proceeds are deposited in the Special Accounts until the date (giving effect to any payment from such Special Accounts of the Minimum Payment pursuant to Sections 3.2(a), 3.3(d), or 3.3(h) hereof)

the Adjusted Base Payment is made to the Rehabilitators *multiplied by* a fraction, the denominator of which is the total of such Net Proceeds (excluding those Net Proceeds attributable to Foremost-Baldwin Partners) and the numerator of which is the Adjusted Base Payment (prior to adjustment thereof pursuant to this Section 3.7).

3.8 *Termination.* Anything herein to the contrary notwithstanding, the provisions of this Article III may be terminated at any time before the Closing Date by the Baldwin Companies or the Rehabilitators upon written notice if the Bankruptcy Court has not entered an order confirming a Reorganization Plan on or before January 15, 1986, which Reorganization Plan shall include provisions consistent with and to the effect of Sections 3.1 and 3.2 hereof or if any of the other conditions set forth in Section 3.3 hereof shall not have been met by July 13, 1986, or thirty (30) days after the date on which the Balunit Amount is finally determined, whichever is later; and, in the event of such termination, all provisions of this Article III (except the provisions of Section 3.6 hereof relating to maintaining the Special Accounts) shall terminate and shall be of no further force or effect. In the event of such termination, all Net Proceeds shall be held in the Special Accounts established pursuant to Section 3.6 hereof pending resolution of the claims of the respective parties hereto to such Net Proceeds.

3.9 *No Distributions.* From and after the date of this Agreement, until and including the Closing Date or the date of termination hereof, in the event that the Baldwin Companies sell or otherwise dispose of any of their subsidiaries or assets other than the Affiliate Assets, the Baldwin Companies shall not distribute to their creditors the proceeds of any such sale or disposition occurring during such period.

## ARTICLE IV

## MISCELLANEOUS

4.1 *Good Faith and Fair Dealing.* The Rehabilitators and the Baldwin Companies shall exercise good faith and fair dealing in the performance of this Agreement.

4.2 *Due Authorization by Baldwin Companies.* Subject to the approvals of the Bankruptcy Court, the Indiana Court and the Arkansas Court, approval by the Board of Directors of Baldwin-United and the Executive Committee of D.H. Baldwin and (with respect to Article III hereof) confirmation of a Reorganization Plan, the Baldwin Companies represent and warrant that they are authorized to enter into this Agreement and that there are no outstanding commitments, agreements or understandings, expressed or implied, that may or can in any way defeat or modify the rights conveyed or obligations undertaken by them under this Agreement.

4.3 *Due Authorization by the Rehabilitators.* Subject to the approvals of the Bankruptcy Court, the Indiana Court and the Arkansas Court, and (with respect to Article III hereof) confirmation of a Reorganization Plan, the Rehabilitators represent and warrant that they are authorized to enter into this Agreement and that there are no outstanding commitments, agreements or understandings, expressed or implied, that may or can in any way defeat or modify the rights conveyed or obligations undertaken by them under this Agreement.

4.4 *Entire Agreement.* This Agreement sets forth the entire agreement and understanding among the parties hereto relating to the subject matter hereof and supersedes all prior discussions and documents. No party hereto shall be bound by any terms, conditions, definitions, warranties, understandings or representations with respect to the subject matter hereof other than as expressly provided for

herein except as may hereafter be agreed in a writing signed by the parties hereto.

4.5 *Successors and Assigns.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and the Arkansas Companies and the Indiana Companies and to all parties' respective successors and assigns, including any trustee appointed in the Bankruptcy Case or any subsequent case under Chapter 7 of the Bankruptcy Code.

4.6 *Notice.* Any notice or other communication required or desired to be given hereunder shall be deemed to be given to the addressee when received and shall be sent by registered mail, postage pre-paid, return receipt requested, or by hand delivery, to each of the parties hereto at the address listed below, unless such address shall have been changed by notice in writing:

If to Miller:

Don H. Miller
Insurance Commissioner
Indiana Insurance Department
509 State Office Building
Indianapolis, Indiana 45204

Copy To:

Charles W. Havens III, Esq.
LeBoeuf, Lamb, Leiby & MacRae
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

If to Garner:

Linda N. Garner
Insurance Commissioner
Arkansas Insurance Department
400-18 University Tower Building
Little Rock, Arkansas 72204

Copy To:

Karl Rubinstein, Esq.
Freytag, LaForce, Rubinstein & Teofan
1800 Skyway Tower
400 North Olive
Dallas, Texas 75201

If to the Baldwin Companies:

Peter A. Martosella, Jr.
President, Baldwin-United Corporation
Executive Vice President,
D. H. Baldwin Company
Baldwin-United Corporation
1700 Market Street, 31st Floor
Philadelphia, Pennsylvania 19103

Copies To:

Robert H. Beber, Esq.
Senior Vice President and
General Counsel
Baldwin-United Corporation
1700 Market Street, 31st Floor
Philadelphia, Pennsylvania 19103

and

Robert J. White, Esq.
O'Melveny & Myers
400 South Hope Street
Los Angeles, CA 90017

4.7 *Waiver.* The failure of any party hereto at any time to require performance by any other party of any provision hereof shall not affect in any way the right to require such performance at any time thereafter. Nor shall the waiver by any party hereto of a breach of any provision hereof be taken or held to be a waiver of the provision itself.

4.8 *Governing Law.* The validity, interpretation, and performance of this Agreement shall be governed by and construed in accordance with the laws of the State of New York.

4.9 *Headings.* The heading of each Article, Section and Paragraph of this Agreement is for the purpose of convenience only and shall not affect the interpretation of any provision hereof.

4.10 *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original hereof.

4.11 *Tolling of Statutes of Limitations.* All statutes or periods of limitation applicable to the claims and counterclaims of the Baldwin Companies and the Rehabilitators shall be tolled on the date of this Agreement and shall continue to be tolled until the termination of the Agreement pursuant to Paragraph 3.8 or otherwise.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement as of the date and year first above written.

---

LINDA N. GARNER, as
Rehabilitator and Receiver of
National Investors Life Insurance
Company, National Investors Pension
Insurance Company and Mt. Hood
Pension Insurance Company, and
not in her individual capacity

---

DON H. MILLER, as
Rehabilitator of National Equity
Life Insurance Company, Inc., S & H
Life Insurance Company and
University Life Insurance Company
of America, and not in his
individual capacity

BALDWIN-UNITED CORPORATION

By _____
Peter A. Martosella, Jr.
President

D. H. BALDWIN COMPANY

By _____
Peter A. Martosella, Jr.
Executive Vice President

*EXHIBIT A*

Foremost-Baldwin Partners

Mt. Hood Debenture and Note

Baldwin Enterprises Preferred and Common

Baldwin Finance Preferred

Baldwin Piano & Organ Preferred

Balunit Preferred

Balunit Common

D.H. Baldwin Commercial Paper

D.H. Baldwin Preferred

B-U Acquisition Common

Mt. Hood Stages Common

National Farmers Union Service Corporation

National Farmers Union Property and Casualty Co.

Empire Mutual Surplus Notes

330 Madison Avenue, Inc. Common and Preferred

As used herein, the term "Affiliate Assets" also includes the above-mentioned securities and other assets, as well as the direct and indirect subsidiaries of the entities whose Common stock is listed herein (except for the direct and indirect subsidiaries of National Equity Life Insurance Company, other than Foremost-Baldwin Partners, and the direct and indirect subsidiaries of University Life Insurance Company of America). By way of elaboration, but not in limitation of the foregoing, the following direct and indirect subsidiaries and affiliates of Balunit, Inc. are included in the term "Affiliate Assets":

Baldwin-United Acquisition Corp. and Subsidiaries

—Various clone companies holding MGIC Investment Corp. and Subsidiaries

—MGIC Mortgage Services Corp.

—College University Holding Co. and Subsidiaries
College University Corp.

The College Life Insurance Co. of America and Subsidiaries

College Park Corp. and Subsidiaries

Top Value Enterprises, Inc. and Subsidiaries

Bolivian Power Co. and Subsidiaries

CIP Liquidating Trust and Subsidiaries

S & H Group Inc. and Subsidiaries

The Subsidiaries and Affiliates of National Farmers Union Service Corporation, including National Farmers Union Life Insurance Company

The Subsidiaries and Affiliates of National Farmers Union Property and Casualty Company

*EXHIBIT B*

National Farmers Union Service Corporation and all of its direct and indirect subsidiaries.

National Farmers Union Property & Casualty Company (Utah) and all of its direct and indirect subsidiaries.

## APPENDIX F

## CONSTITUTION OF THE UNITED STATES

Article I, Sec. 8, cl. 4

The Congress shall have Power . . .

* * * *

To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

Article VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

## STATUTES

11 U.S.C. § 109 (1982).* Who may be a debtor

* * * *

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an

---

* The versions of the Bankruptcy Code subsections excerpted here are those which apply to Baldwin's bankruptcy case. Certain provisions of title 11 and title 28 were amended by The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. The amendments to the excerpted subsections of title 28 apply to all cases pending on July 10, 1984, the date of enactment, Pub. L. No. 98-353, § 122(a), and have been incorporated here. The amendments to the excerpted subsections of title 11 apply only to bankruptcy cases filed 90 days after that date. *Id.* § 553(a). Since Baldwin's petition for reorganization was filed on September 26, 1983, the amendments to these title 11 subsections do not apply to Baldwin's bankruptcy case, and have not been incorporated.

insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

* * * *

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockholder or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

11 U.S.C. § 541 (1982). Property of the estate

(a) The commencement of a case . . . creates an estate. Such estate is comprised of all the following property, wherever located:

(1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * *

11 U.S.C. § 544 (1982). Trustee as lien creditor and as successor to certain creditors and purchasers

* * * *

(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim . . . .

* * * *

11 U.S.C. § 547 (1982). Preferences

* * * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer—

(i) was an insider; and

(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

* * * *

11 U.S.C. § 548 (1982). Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of any interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted; or

(2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B) (i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

* * * *

15 U.S.C. § 1011 (1982). McCarran-Ferguson Act

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012 (1982).

* * * *

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

28 U.S.C.A. § 157 (West Supp. 1984). Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

* * * *

(C) counterclaims by the estate against persons filing claims against the estate;

* * * *

(F) proceedings to determine, avoid, or recover preferences;

* * * *

(H) proceedings to determine, avoid, or recover fraudulent conveyances.

* * * *

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

* * * *

28 U.S.C.A. § 1334 (West Supp. 1984). Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

* * * *

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

## APPENDIX G

The following is a list of the parent companies, subsidiaries (except wholly owned) and affiliates of the corporate petitioners, pursuant to Supreme Court Rule 28.1:

Allcity Insurance Company

Baldwin Life Insurance Company

Balunit, Inc.

The Barbados Light & Power Co. Ltd.

Brookwood Apts., Ltd.

Canadian International Power Company Liquidating Trust

Chevy Chase Associates

College/University Corporation

College/University Holding Corp.

Compania Boliviana de Energia Electrica, S.A.—Bolivian Power Company Limited

Compania de Alumbrado Electrico de San Salvador

Empire Mutual Insurance Company

Empresa de Luz y Fuerta Electrica de Oruro

Farmers & Ranchers Life Insurance Co.

Kendale Lakes Mall

Kenwood Place Associates

Lake Sherwood Joint Venture

MAC Development Corporation of Florida, Inc.

Mortgage Guaranty Insurance Corp.

Mutual Management, Inc.

Northmoor-South Apts., Ltd.

Oakhurst Square, Ltd.

Oakhurst Square II, Ltd.

Shops of Springtree

Spanish Oaks Apts., Ltd.

Spanish Oaks Apts. II, Ltd.

Top Value Enterprises, Inc.

84-1488 (3)

No. 84-1480

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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BALDWIN-UNITED CORPORATION
AND D.H. BALWIN COMPANY,
*Petitioners,*

v.

ROBERT M. EUBANKS, III, INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas**

---

## BRIEF IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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No. 84-1480

---

BALDWIN-UNITED CORPORATION
AND D.H. BALWIN COMPANY,
*Petitioners,*

v.

ROBERT M. EUBANKS, III, INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas**

---

## BRIEF IN OPPOSITION

---

Robert M. Eubanks, III, Insurance Commissioner for the State of Arkansas hereby files this his Brief in Opposition to the Petition for Writ of Certiorari filed by Baldwin-United Corporation and D.H. Baldwin Company.[1]

## STATEMENT

### A. Brief Summary of Respondent's Position.

Respondent does not agree with Petitioners' version of the issues presented by this case. In outline, Respondent's position is as follows:

---

[1] Respondent's parent companies, subsidiaries and affiliates are listed in the Appendix to this Brief pursuant to Rule 28.1.

1. This case does not present a vital federal question and is not a proper case for the granting of certiorari.

2. The settlement between the parties does not render this case moot because the settlement is tentative and this Court should not dismiss for mootness.

3. Assuming, arguendo, that the case is moot by reason of the settlement, this Court should simply dismiss the petition and should not vacate the Arkansas Supreme Court opinion.

4. If this Court determines the petition should be granted, then the decision of the Arkansas Supreme Court should be sustained because it correctly applies the law.

**B. The Nature of the Case.**

Petitioners attempt to characterize this case as an unsanctioned intrusion by a state court into the area of Federal Bankruptcy. That is not the fact.

While it may be true that this matter involves the largest bankruptcy in history, it is equally true that it also involves the largest insurance insolvency proceedings in history.

In July, 1983 state courts in Arkansas and Indiana placed six insurance companies into Rehabilitation pursuant to state statutes. Petitioners consented to this action.[2] The property rights of over 300,000 policyholders are at stake, and in many instances the life-savings of retirement-aged people are involved.

The rehabilitation and liquidation of insurance companies has long been left to the states, pursuant to state statutes, under the auspices of state courts.

---

[2] See Appendix C to Petitioners' Appendix. In this regard this Court should note Petitioners consented to the entry of the injunction issued on July 13, 1984 by the Rehabilitation Court.

The instant application arises out of the Arkansas Rehabilitation proceedings. Respondent and his predecessor in office have acted expeditiously and in strict compliance with the applicable state statutes (Ark. Stat. Ann. 66-4800, et seq., Appendix A). From January 9 to January 14, 1984 the Circuit Court of Pulaski County, Arkansas (the "Rehabilitation Court") held a full and free evidentiary hearing. Petitioners fully participated in the hearing.

On March 23, 1984 the Rehabilitation Court entered its Order Adopting Plan of Rehabilitation and, inter alia, found that certain assets were the property of the insurance companies and reasserted exclusive, continuing jurisdiction over those assets. The Rehabilitation Court's Order also enjoined all parties and other persons and entities from asserting claims to those assets other than in the Rehabilitation Court unless such party first obtained the permission of the Rehabilitation Court to do so. The issuance of such an injunction is expressly authorized by Ark. Stat. Ann. 66-4804. In Respondent's view these circumstances do not present any intrusion into the area of federal bankruptcy and do not present a vital federal question. Assuming the efficacy of the Rehabilitation Court's fact finding that the assets in question are the property of the insurance companies,[3] then there is not a vital federal question presented.

Under the applicable law (discussed in detail below) the two separate systems, state insurance insolvency and federal bankruptcy, do not conflict in this case. A hearing has been held which resulted in a finding that a certain res belonged to the insurance companies and the Rehabilitation Court asserted in rem jurisdiction over that res. That Court then protected its jurisdiction by an injunction.

---

[3] As discussed below, the Petitioners, having participated in the hearing, are bound by this fact finding.

Petitioners have already had their day in court as to the issue of whether the res belongs to the insurance companies. That being the case, it would be improper to allow them to litigate the issue again, whether in bankruptcy court, in federal district court or in another state court. These circumstances do not raise a federal question worthy of the attention of this Court.

Respondent concedes that the Bankruptcy Court has jurisdiction over certain assets, the title to which is in Petitioners. It is equally true, however, that the Rehabilitation Court has jurisdiction over certain assets, title to which is in the insurance companies.

Claims against assets in the hands of the Rehabilitation Court should be pursued in the Rehabilitation Court. An injunction which requires claims to be pursued in such fashion does not conflict with relevant law and does not intrude upon the jurisdiction of the bankruptcy court.

**C. This Case Is Not Necessarily Moot.**

The settlement is a tentative settlement conditioned upon the occurrence of several future conditions which may or may not be satisfied. As a matter of fact, the settlement is presently subject to cancellation because a tax allocation agreement which the parties were required to agree upon by February 21, 1985 has not yet been agreed upon. Respondent hopes that it will yet be agreed upon and that the several other conditions to the binding effect of the settlement will be met, but there is no certainty that this will occur. Under such circumstances this matter is not necessarily moot. Further, the Rehabilitation Plan and the Opinion of the Arkansas Supreme Court upholding the Plan involve public issues. The vital public interest of the State of Arkansas, as well as the vital rights of hundreds of thousands of policyholders and others will be affected by this case. Accordingly, the Petitioners are not the only ones with an interest in this matter.

**D. Even if the Case Is Moot, This Court Should Not Vacate the Arkansas Supreme Court Opinion.**

Vacating the opinion would cast doubt upon the application of the Plan, including the injunction provisions, to many other situations and the rights of many other interested persons and entities. Such a result should not follow because Respondent and Petitioners have entered into a tentative settlement agreement.

**E. The Opinion Below Is Proper in any Event.**

The Arkansas Supreme Court's opinion is sound and does not threaten to undermine the bankruptcy system. The Arkansas Supreme Court has very cogently set out the basis for its ruling in its opinion. As to the primary challenge made by Petitioners, the Arkansas Court reasons in substance that:

> (1) Under the McCarran-Ferguson Act no act of Congress shall "invalidate, impair or supersede any law enacted by any state for the business of insurance."
>
> (2) The Arkansas comprehensive statautory scheme for dealing with impaired insurance companies expressly authorizes the issuance of injunctions in connection with insolvency proceedings and was enacted for the business of insurance.
>
> (3) It therefore logically follows that the Bankruptcy Code, which is an act of Congress, cannot invalidate, impair or supersede the Arkansas statutory scheme, including the injunction provisions.

Additional support for this logic comes from the Bankruptcy Code's exclusion of insurance companies under 11 U.S.C. 109(b) and (d).

The Court also found that the injunction issued does not exceed the Rehabilitation Court's statutory authority and that Petitioners did not contend it did.

If a state court having jurisdiction of a res pursuant to a state insurance insolvency proceeding cannot protect that res from the inevitable erosion which would result from multiplicitious litigation in distant jurisdictions, then the states will be rendered powerless to deal with such insolvencies in any meaningful way. If the states are not able to deal with them, they will not be dealt with because insurance companies cannot be debtors under the bankruptcy laws.

This case does not represent the danger to the federal bankruptcy system that Petitioners suggest it does. The actual danger presented by this case is that if Petitioners' position is adopted by this Court, the insurance insolvency systems of the various states will suffer a crippling and, probably fatal, blow.

Another distinct point to be made in support of the opinion below is that there is a res adjudicata or collateral estoppel effect from the Rehabilitation Court's fact finding that the res in question is the property of the insurance companies. Even if this Court were totally to accept Petitioners' view of the law, it is still necessary that there be a triable fact issue for the Bankruptcy Court even if that Court otherwise has the requisite jurisdiction. Given the finding already made by the Rehabilitation Court, which is now a final judgment, there is nothing for the Bankruptcy Court to try as to ownership of the assets.

## ARGUMENT AND AUTHORITIES

### I. THE WRIT SHOULD NOT BE GRANTED.

This Court has no doubt noted that Petitioners assert that they have been enjoined from pursuing claims "to property that *may* be part of the bankruptcy estates." In view of the fact findings by the Rehabilitation Court, the injunction goes to specific assets which a court of competent jurisdiction has already found *are* the property of

the insurance companies. That being the case, there is no basis upon which to believe they *may* be part of the bankruptcy estates. Petitioners should not be given multiple opportunities to litigate the same issue. The Rehabilitation Court's fact finding is no longer reviewable; *Evco v. Franklin Jones*, 409 U.S. 91 (1972); and it is entitled to full faith and credit. *Pennoyer v. Neff*, 95 U.S. 714 (1878); 12 U.S.C.A. 1738; *Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691 (1982).

Petitioners' characterization of the Arkansas Court's opinion as "extraordinary" and "parochial" not only does injustice to a succinct and well-reasoned opinion, but it attempts to obscure the real issues of the case. The court's opinion was correct. See detailed discussion at p. 10, et seq., infra.

In this connection it is interesting to note that on page 19 of Petitioners' application they make much of the Congress' 1984 designation of fraudulent transfer and preference claims as "core" bankruptcy matters. Whether these are core proceedings in the context of the Bankruptcy Code or not is irrelevant to the Respondent's position and to the basis for the Arkansas Supreme Court's opinion. Petitioners fail to mention the mandatory abstention provisions of 28 U.S.C.A. § 1334(c)(2) which would seem to support Respondent's position. Even though the effective date of these provisions probably renders them inapplicable to the current case, they do show that Congress does not support the dragnet approach of Petitioners even with respect to "core" proceedings. See also *In Re Dakota Grain Systems, Inc.*, 41 B.R. 749 (Bankr. D N.D. 1984).

In this regard, the same observation can be made concerning the mandatory provisions of 28 U.S.C.A. § 157(d) which require the district court to withdraw cases from the bankruptcy court which require consideration of both Title 11 and other laws of the United States regulating

organizations or activities affecting interstate commerce. Again, this provision may not apply specifically to this case, but it does show a congressional unwillingness to allow bankruptcy courts to deal with every issue which can arise in a bankruptcy context.

It is also fair to say that *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) militates against Petitioners' position. Arkansas has preference and fraudulent transfer statutes of its own and does not need to resort to the bankruptcy laws in that regard. Further, these federal statutes could be applied in the state court. Any fraudulent transfer claim with respect to the assets held by the insurance companies not only could have been brought in state court, independent of any bankruptcy proceedings, but they still could be. Further, *Northern Pipeline* places severe limitations on the power of Article I bankruptcy judges to hear traditional Article III matters. It is doubtful that 28 U.S.C.A. 157 has remedied the problem.[4] In any event, insurance insolvency matters should not be left to the jurisdiction of Article I judges when Congress and this Court have stated such matters are within the province of the States.

The injunction issued by the Rehabilitation Court is not absolute. It provides Petitioners an opportunity to seek relief from its provisions by requesting such relief from the Rehabilitation Court. That Court's Order also allows Petitioners to file whatever claims they wish to file in the Rehabilitation Court.

Under these circumstances and in view of the discussion below the writ should not be granted.

## II. THIS CASE IS NOT MOOT.

The settlement between the parties is subject to several conditions, at least one of which has already failed, and

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[4] For example, a recent bankruptcy court decision has held 28 U.S.C.A. 157(b)(2)(f) to be unconstitutional. *In the Matter of Associated Grocers of Nebraska Cooperative, Inc.*, 46 Bankr. 173 (B.C., D.C. Neb., 1985).

is therefore a tentative settlement. This Court has held that a tentative settlement agreement does not render a matter moot. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465, n. 3 (1978).

While Respondents hope that this tentative settlement will ultimately be consummated, there is no certainty that will happen. Under these conditions, the case should not be considered moot.

This Court should also give weight to the fact that Petitioners are not the only parties who have an interest in the opinion of the Arkansas Court. The opinion is important to the rights of hundreds of thousands of other interested persons and entities. That being the case, the Court would have a sound rationale for finding the case is not moot, especially in view of the tentative nature of the settlement.

The Court may also wish to consider the public interest in a resolution of the issues presented, and determine that in certain cases the public interest is so vital, the persons whose rights may be affected are so numerous, and the likelihood of repetition so great, that the matter is not moot. *I.e., Americana Health Care Corp. v. Schweiker*, 688 F.2d 1072, 1976 n. 10 (7th Cir. 1982), cert. den., 459 U.S. 1202; *In re National Broadcasting Co.*, 635 F.2d 945, 949 n. 1 (2nd Cir. 1980); *Matter of Carlson*, 580 F.2d 1365, 1372-1373 (10th Cir. 1978); *Trachtman v. Anker*, 563 F.2d 512, 514 n.1 (2nd Cir. 1977), cert. den., 455 U.S. 925; *Jones v. Illinois Dept. of Rehabilitation Services*, 689 F.2d 724, 727-728 (7th Cir. 1982).

This controversy is almost certainly going to recur, if not with respect to others interested in the instant rehabilitation proceedings, then in connection with other rehabilitation proceedings, and it surely involves the vital public interest. No purpose would be served in promoting repetitious litigation over the issues raised with respect to the ability of the states to administer rehabilitation and other insurance insolvency matters. *DeFunis v.*

*Odegaard*, 416 U.S. 312 (1974) (dissent and authority cited therein).

## III. EVEN IF THE CASE IS MOOT THIS COURT SHOULD DISMISS THE APPLICATION AND SHOULD NOT VACATE THE ARKANSAS SUPREME COURT OPINION.

Vacating the Arkansas Opinion would cast doubt upon the Rehabilitation Plan and introduce needless confusion into a process which is now proceeding quite well in the state courts.

Vacation of the decision of the Arkansas Supreme Court could rob that decision of its precedential value. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). In the instant case, the precedent set by the Arkansas Supreme Court is of extreme importance. The crediting rate issue determined by the Arkansas Court and that Court's general affirmance of the Plan of Rehabilitation bring certainty to what was a chaotic situation. If doubt is now cast upon the Arkansas Opinion chaos could return.

This Court has avoided the destruction of the stare decisis effect of state court opinions in the past by simply dismissing petitions for writ of certiorari. *District Attorney v. Sacramento City Civil Serv. Commission*, 449 U.S. 811 (1980); *Logan v. Strickland*, 440 U.S. 902 (1979). Should the Court determine the case to be moot, Respondent urges the Court to adopt this approach and preserve the stare decisis value of the Arkansas Opinion.

## IV. IF THIS COURT DETERMINES THE PETITION SHOULD BE GRANTED, THEN THE DECISION OF THE ARKANSAS SUPREME COURT SHOULD BE SUSTAINED BECAUSE IT CORRECTLY APPLIES THE LAW.

Petitioner wrongly attempts to couch this case in Supremacy Clause terms and present it as some form of assault by the State of Arkansas upon the federal system in general and the bankruptcy system in particular.

Neither Respondent nor the Arkansas Supreme Court deny the power of Congress to create and maintain a uniform system of bankruptcy. Neither deny the Supremacy Clause. In fact, both rely upon the clear language of federal law and the clear result that law mandates.

### A. Jurisdiction Over Insurance Company Insolvency Proceedings Lies With the States and Not With the Bankruptcy Courts.

The operation of the McCarran-Ferguson Act, 15 U.S.C. 1011, et seq., and the provisions of the Bankruptcy Code, 11 U.S.C. 109 mandate the result reached by the Arkansas Supreme Court.

> [these] businesses require public supervision and control because they deal with people who are at an economic disadvantage, vis a vis these enterprises. In the case of insurance companies, most states have enacted regulatory schemes which include provisions for insolvency. Since these schemes are designed to protect the interests of policyholders and to provide for the adjustment of the rights of creditors and policyholders in the event of insolvency . . . Congress . . . decided that liquidation of insurance companies should be left to the states. . . . By preserving state liquidation proceedings, Congress sought to prevent bankruptcy or reorganization counts from interfering with comprehensive state insurance regulations and with the rights of insureds protected by such regulations. *In Re Equity Funding Corporation of America*, 396 F.Supp. 1266, 1275 (C.D. Cal. 1975).

*See also Sims v. Fidelity Assur. Ass'n.*, 129 F.2d 442 (4th Cir. 1942); *In re Supreme Lodge of the Masons Annuity*, 286 F. 180 (N.D. Ga. 1923); *Woolsey v. Security Trust Co.*, 74 F.2d 334 (5th Cir. 1935) (state bank).

In pertinent part, Section 2 of the McCarran-Ferguson Act provides:

> a) The business of insurance and every person engaged therein, shall be subject to the laws of the

> several states which relate to the *regulation* or taxation of such business.
>
> b) *No* Act of Congress shall be construed to *invalidate, impair* or *supersede any law* enacted by *any State for the business of insurance,* or which imposes a fee or tax upon such business, unless such Act specifically relate to the business of insurance: [There follow several exceptions not relevant here]. (Emphasis added)

It is impossible to deny that the Bankruptcy Act is an act of Congress and it is eminently clear that the Bankruptcy Act does not relate to the business of insurance because the act itself excludes insurance companies.

In *Prudential Insurance Co. v. Benjamin, Insurance Commissioner,* 328 U.S. 408 (1946) this Court held that one of Congress' purposes in the act was to "declare expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject' to the laws of the several states in these respects."

In *Group Life and Health Insurance Company v. Royal Drug Company,* 440 U.S. 205 (1979). This Court said McCarran-Ferguson makes the states supreme with respect to laws regulating the business of insurance. In that case this Court also held that the relationship between the insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement were the core of the 'business of insurance'.

The instant Rehabilitation Plan and proceedings are part of the regulation of these "core" aspects of the business of insurance.[5]

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[5] Petitioners cite these two cases for the proposition that the Rehabilitation process is not the business of insurance. There is no support for them here. While it may be that an insurance company's contract with a pharmacy or its plumber may not be the business of insurance, its contract with its policy holders certainly is.

Even prior to McCarran-Ferguson, federal courts were not permitted to interfere with state insurance insolvency proceedings. *Motlow v. Southern Holding and Securities Corp.*, 95 F.2d 721 (8th Cir., 1938); *Jacoby v. Bond & Mortgage Guaranty Co.*, 72 F.2d 420 (2d Cir. 1934), cert. den., 273 U.S. 619 (1934).

Insurance rehabilitation attempts to maintain operation of the insurance companies to maximize return to policyholders and creditors and is a key element of the state's regulation of the insurance business. The Arkansas Supreme Court, which is the final interpreter of Arkansas law,[6] specifically held that the rehabilitation of these three insurance companies is of vital state concern and that Ark. Stat. Ann. 66-4804, which authorizes the injunction in issue, is a law enacted for the business of insurance.

Unless McCarran-Ferguson and the Bankruptcy Act do not mean what they plainly say, and unless the Arkansas Supreme Court does not recognize an Arkansas law "enacted for the business of insurance" when it sees one; the Arkansas Court's analysis, in all good sense, should resolve this case. There is no conflict between Arkansas and the federal system because the Arkansas Supreme Court's Opinion is totally consistent with federal law.

### B. The Arkansas Injunction Does Not Violate the Relationship Between State and Federal Courts.

The instant case is not a Supremacy Clause case. The courts below have not acted in contravention of the federal scheme for insurance insolvency juridiction. Rather, the Arkansas Court has done nothing more than faithfully apply existing federal law to Arkansas statutes.

At a minimum, an insurance insolvency court must have the power to protect its *in rem* and *quasi in rem* jurisdiction over the assets of the insurance companies

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[6] *Brown v. Ohio*, 432 U.S. 161, 167 (1977), *Garner v. Louisiana*, 368 U.S. 157, 169 (1961).

which are the res it is the Court's duty to deal with.[7] *Matter of Bankers Trust Company*, 556 F.2d 1281 (5th Cir. 1978).

> In this case, the state court restrained Moody from, and assessed damages for, his action which did and would interfere with the receivership proceeding. It cannot be disputed is one *in rem* or *quasi in rem*. The [federal case in which Moody joined], had it succeeded, would have impeded, if not thwarted, the entire receivership proceeding. Moody's conduct in the [federal] case attacked the very validity of the receivership, jurisdiction over which, under *Donovan*, rested safely and exclusively in the Alabama State court.[8] *Sumrall v. Moody*, 620 F.2d 548, 550 (5th Cir. 1980).

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[7] In *Underwriters' National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691, 696 n.2 (1982), this court noted, with criticism, that several pending state and federal actions had been stayed pursuant to an injunction issued by the Rehabilitation Court in that case. That injunction was very similar to the one issued in the instant case.

[8] For an example of the nightmare of litigation which could occur if an insurance insolvency court is not able to protect its jurisdiction, and the type of antics a determined shareholder can resort to; see the Moody cases: e.g.: *Sumrall v. Moody, supra*; *Moody v. Alabama ex rel. Payne*, 355 So.2d 1116 (Ala. 1978), cert. den. 439 U.S. 910 (1978); *Ex parte Shearn Moody*, 351 So.2d 538 (Ala. 1977), cert. den. 435 U.S. 969 (1978); *Moody v. Alabama ex rel. Payne*, 351 So.2d 552 (Ala. 1977), cert. den. 435 U.S. 969 (1978); *Moody v. Texas*, 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.), cert. den. 434 U.S. 985 (1977); *Ex parte Shearn Moody*, cert. den. 434 U.S. 835, reh. den. 434 U.S. 976 (1977); *Moody v. Moody Nat'l. Bank*, 522 S.W.2d 710 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd, n.r.e.); *Moody v. Crook*, 520 S.W.2d 958 (Tex. Civ. App.—Austin 1975, no writ). *Ex parte Moody*, 418 So.2d 93 (1982), cert. den. 459 U.S. 1226; *Moody v. State*, 539 S.W.2d 354 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) cert. den. 434 U.S. 985 (1978); *Moody v. State*, 520 S.W.2d 452 (Tex. App.—Austin 1975, writ ref'd n.r.e.); *Moody v. Jones*, 519 S.W.2d 536 (Tex. Civ. App.—Austin 1975, no writ); *Empire Life Ins. Co. v. Moody*, 584 S.W.2d 855 (Tex. Sup. 1979).

The injunction protects the assets of the insurance companies for the benefit of all policyholders and creditors. "The assets would not be protected nor claims paid equitably if the liquidator were forced to defend lawsuits brought after the liquidation decree was entered:" *Janak v. Allstate Ins. Co.*, 319 F.Supp. 215 (1970).

Petitioners argue that the claims in question are *in personam* and that their resolution by the bankruptcy court is in no way tantamount to reorganizing the insurance companies and would not inhibit the state rehabilitation process. This is not true. If the Bankruptcy Court now decides to somehow reverse the finding already made by the Rehabilitation Court as to ownership of the assets and then order the Rehabilitation Court to turn the assets over (or order the Rehabilitator/Receiver to do so in contravention of an order of the court which appointed him), this would clearly inhibit the Rehabilitation process.

Petitioners' argument that this result would operate in personam and not in rem is based upon *Massie v. Watts*, 10 U.S. (6 Cranch) (1810); *Sax v. Sax*, 295 F.2d 133 (5th Cir., 1961) and *Mandley v. Backer*, 121 F.2d 875 (D.C. Cir., 1941). Petitioners also relied upon *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Ins. Co.*, 600 F.2d 671 when they briefed this issue in the Arkansas Supreme Court, but they no longer cite it for that purpose. The probable reason for their abandonment is that a sequel to *Central States* has cut the ground out from under this approach. *Old Security Life Ins. Co. v. Continental Illinois National Bank*, 740 F.2d 1384 (7th Cir. 1984).

While *Central States* seemingly lent some support to Petitioners' argument, *Old Security* held that the state insolvency court could not be ordered to pay an in personam judgment even if one were obtained. Thus, Petitioners' rationale would lead them through a long and tedious process of litigation which might result in a judgment in their favor or which might not. If they did

succeed in obtaining a judgment they would then be required to confront the same Rehabilitation Court Order they now confront. If this is the road Petitioners wish to travel, the destination hardly seems worth the trip. Furthermore, such a process would be an egregious waste of the assets of both the bankruptcy estates and the insurance estates and would involve needless litigation which this Court should not encourage or sanction.

When all is said and done, the state court has control of the res, and no other court can require it to surrender that control. It has been held that protection of the *in rem* and *quasi in rem* jurisdiction of the state insurance insolvency court may require restraint of actions which interfere with the insurance insolvency proceeding. *Sumrall v. Moody, supra.*

Petitioners argue strenuously that the preferential transfer and fraudulent conveyance claims are *in personam* and that this necessarily means that such claims do not interfere with the *in rem* jurisdiction of the state insolvency court. This reasoning is unsound.[9] Moreover, this argument does not consider the policy behind the *in rem/in personam* distinction in the insolvency context. *In rem* jurisdiction allows the insolvency court to protect its jurisdiction over the *res* by an appropriate injunction. The Second Circuit has recognized that an action which is ostensibly *in personam* may become one which threatens the *res* when its purpose is to disrupt the *in rem* proceeding. *Brooklyn Trust Co. v. Kelby*, 134 F.2d 105 (2d Cir. 1943), *cert. den.* 319 U.S. 767 (1945). As that court noted:

> Appellant seems to argue that the action against Manhattan . . . is not *quasi in rem* because it does not relate to a *res*, on the ground that it merely seeks a money decree "in personam" against Manhattan as

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[9] This unsoundness is discussed, *supra*, but it is also unsound because the current confused state of the bankruptcy laws would only introduce an additional layer of time-consuming uncertainty to the rehabilitation process.

> trustee, and that a "right" which is "in personam" cannot be a "res". That is a mistaken notion, based upon a play upon the unfortunate vagueness of the Latin word "res", a vagueness which would be more apparent if the word were Englished (or Americanized) and called a "thing". But no matter how inadequate "res" may be as a descriptive label, it is not true that a money claim *in personam* cannot be a "res".

Regardless of the many ways in which the situation can be viewed, the simple fact is that the Rehabilitation Court has jurisdiction of the assets of the insurance companies, it has implemented a detailed and comprehensive Rehabilitation Plan and the Plan is proceeding quite well. The Rehabilitation Court should be left to do its job in an organized, sensible manner without interference from other courts.

### C. The Arkansas Supreme Court Did Not Err in Finding Authority for the Injunction in Section 109 of the Bankruptcy Code and the McCarran-Ferguson Act.

Petitioners have asserted that the amount of their claims *may* reach into the hundreds of millions of dollars.[10] Moreover, if Petitioners' petitions were sustained and they were allowed to pursue their claims against the insurance companies in a distant forum so could others. A nightmare of litigation could ensue, with hundreds of thousands of suits being brought by policyholders or creditors in all fifty states. Obviously, if Petitioners may proceed as to the res in this bankruptcy court, then others could proceed

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[10] Respondent points out again that these "claims" are mere will-o-the-wisps in this case. They are only "maybes" and there is nothing in the record with respect to their real nature or their merits. Respondent would further point out, however, that these "claims" are "downstream" preference and fraudulent transfer claims which have little merit. See, Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U. Pa. L. Rev. 235, 238; *In Re Royal Crown Bottlers of North Alabama*, 23 B.R. 28 (N.D. Alabama, 1982).

in their bankruptcy courts in other related cases. The Rehabilitation Court, acting pursuant to an unchallenged state statute, Ark. Stat. Ann. 66-4804, enjoined this possibility and it was right and proper to do so.

The rehabilitation of the insurance companies by Respondent and his Indiana counterpart is a very significant and complex matter. Under 11 U.S.C. 109, no federal bankruptcy court can accord the insurance companies insolvency relief. This role is left to the states. The issue correctly resolved by the courts below is the extent to which a state court may act to protect its insurance insolvency jurisdiction.

Only a state court may take *in rem* jurisdiction over an insurance insolvency proceeding. Although it is generally held that a state court may not enjoin federal proceedings, "[a]n exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed". *Donovan v. City of Dallas*, 377 U.S. 408 (1964). In the instant case the courts below have acted to protect the *in rem* jurisdiction of the Rehabilitation Court. This has required the injunction of the prosecution of all actions against the insurance companies in forums other than the Rehabilitation Court.

The purpose of according deference to a court with *in rem* jurisdiction is the prevention of dissipation of the *res*. In a case the size of the instant case, failure to issue such an injunction could mean the piecemeal dissipation of the *res* in foreign jurisdictions, minimizing return to policyholders and creditors. Such a result would happen in any similar case and could well dissipate all the assets of a particular estate with the result that a rehabilitation which could have been possible could be rendered impossible. Surely Congress did not exempt insurance companies from debtor status in bankruptcy in order to make them less able to be effectively rehabilitated or

liquidated than non-regulated entities. Instead, the exemptions from federal regulation contained in 11 U.S.C. 109 and 15 U.S.C. 1011 et seq. for insurance companies were intended to enhance the effectiveness of state regulation of the insurance companies. The Arkansas courts have acted to ensure that an effective rehabilitation is possible through an injunction which conserves the *res* against a palpable threat of dissipation through litigation in distant venues. This action should not be overturned.

In *Matter of Banker's Trust*, 566 F.2d 1281, 1286 (5th Cir. 1978) the Fifth Circuit determined that federal courts should not determine priorities among creditors of a savings and loan. Like insurance companies, savings and loans may not become debtors in bankruptcy. 11 U.S.C. 109, former 11 U.S.C. 22 (superseded). As the court in *Banker's Trust* noted:

> If any meaning is to be given to congressional exclusion of savings and loan associations from the Act, it must be that determination of the rights of a savings and loan institution's creditors, a core function of bankruptcy, must be left to state governments.

In precisely the same vein, the Arkansas Supreme Court held "If any meaning is to be given to the congressional exclusion of insurance companies from the bankruptcy act and the mandate of the McCarran-Ferguson act, it must be that the determination of rights among an insurance company's creditors must be left to state preceedings." This holding is eminently correct. No other conclusion can be rendered when the bankruptcy act provisions and the McCarren-Ferguson act provisions are read side by side with the Arkansas rehabilitation statutes.

Insurance companies have long been exempt from Bankruptcy Law. In *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920) this Court stated:

> The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations,

> and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of 'municipal, railroad, insurance or banking' corporations to their creditors and their creditors to them, to other provisions of the law."

Petitioners' position seems to be that an insurance insolvency court should have no right to protect its *res*. However, Petitioners' position ignores the fact that *in rem* insolvency proceedings involving traditionally state regulated entities have consistently exercised that power.

Contrary to Petitioners' assurance that the Arkansas Supreme Court has erred, the Arkansas Court has rendered a coherent, well-reasoned and sensible opinion. Perhaps the core of that opinion as it relates to this application is found in the following:

> We do not hold that the McCarran-Ferguson Act prohibits a person from making a claim in bankruptcy against an insurance company under any circumstances. In this instance, however, an insurance company is being rehabilitated pursuant to a state statutory scheme, and the rehabilitation court found it necessary to enjoin other proceedings in order to secure an orderly rehabilitation. Therefore, the McCarran-Ferguson act prevents the bankruptcy act from being used to invalidate or impair the Arkansas Statutes. The appellants do not have an absolute right to pursue their claim in bankruptcy court.
>
> The rehabilitation of these three insurance companies is of vital state concern.

Given the applicable law and the circumstances presented, this Court should not disturb the comprehensive plan implemented by the Circuit Court and sustained by the Arkansas Supreme Court.

The Arkansas Supreme Court acted in a manner prudent and necessary to preservation of the res. Its decision that "the federal courts may not take action to remove the estate, or any part of it, from the state court's juris-

diction or to subject the same to the federal court's jurisdiction" is certainly not a novel theory. *Leggett v. Green*, 188 F.2d 817, 819 (8th Cir. 1951). *See also, Holley v. General American Life Ins. Co.*, 101 F.2d 172 (8th Cir. 1939). In *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936) this Court upheld an injunction issued by a state court to protect its jurisdiction over an insolvent insurance company res.

The Arkansas Supreme Court correctly interpreted the effect under state law of the bankruptcy exemption for insurance companies. Even if, as Petitioners contend, 28 U.S.C. 1334(d) is in conflict with that policy, then 28 U.S.C. 1334(d) and 11 U.S.C. 109(b) are the conflicting provisions. To reconcile these provisions, analysis of the policy behind the insurance company exemption is necessary. An analogous case is *Matter of Gary Aircraft Corp.*, 698 F.2d 775 (5th Cir. 1983). In that case the jurisdiction conflict was between the bankruptcy court and the Armed Services Board of Contract Appeals. Faced with conflicting claims of exclusive jurisdiction, the Fifth Circuit determined that the Armed Services Board of Contract Appeals' jurisdiction should prevail, due to the specialized knowledge which the Board had of the intricate considerations involved.

Similarly, the State of Arkansas has enacted a comprehensive rehabilitation statutory scheme. Ark. Stat. Ann. 66-4800 et seq. This system provides an orderly scheme for insurance insolvencies which contemplates and addresses the substantial differences between insurance insolvencies and ordinary insolvencies. If, indeed, there is a conflict among federal statutes relating to insolvent insurance companies—which Respondent denies—that conflict should be resolved in favor of the clear and long-standing federal policy towards state regulation of insurance companies.

## CONCLUSION

The Arkansas Supreme Court was correct in its opinion. Certiorari should be denied or the petition should be dismissed without vacating the judgment below. If the Petition is granted then Respondent should prevail.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

## ADDITIONAL STATUTES INVOLVED

Ark. Stat. Ann. 66-4802. *Jurisdiction of delinquency proceedings—Venue—Change of venue—Exclusiveness of remedy—Appeal.*

* * * *

(1) Delinquency proceedings pursuant to this chapter shall constitute the sole and exclusive method of liquidating, rehabilitating, reorganizing or conserving an insurer, and no court shall entertain a petition for the commencement of such proceedings unless the same has been filed in the name of the State on the relation of the Commissioner.

(2) An appeal shall lie to the supreme court from an order granting or refusing rehabilitation, liquidation, or conservation, and from every order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein. (Acts 1959, No. 148, § 639.)

Art. Stat. Ann. 66-4803. *Commencement of delinquency proceedings.*

The Commissioner shall commence any such proceedings by application to the court for an order directing the insurer to show cause why the Commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of the policyholders, creditors, stockholders, members, subscribers or the public may require. (Acts 1959, No. 148, § 640.)

* * * *

66-4804. *Injunctions.*

(1) Upon application by the Commissioner for such a order to show cause, or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

(2) The court may at any time during a proceeding under this chapter issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgment, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.

* * * *

Ark. Stat. Ann. 66-4810. *Order of rehabilitation—Termination.*

(1) An order to rehabilitate a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.

(2) If at any time the Commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.

(3) The Commissioner, or any interested person upon due notice to the Commissioner, at any time may apply to the court for an order terminating the rehabilitation proceedings and permitting the insurer to resume possession of its property and the conduct of its business, but no such order shall be made or entered except when, after a hearing, the court has determined that the purposes of the proceedings have been fully accomplished. (Acts 1959, No. 148, § 647.)

## APPENDIX B

RESPONDENT'S PARENT COMPANIES, SUBSIDIARIES (EXCEPT WHOLLY OWNED SUBSIDIARIES), AND AFFILIATES PURSUANT TO SUPREME COURT RULE 28.1

Allcity Insurance Company
Baldwin Holding Company
Baldwin-United Corporation
Balunit, Inc.
Barbados Light and Power Co., Ltd.
Brookwood Apts., Ltd.
Canadian International Power Company Liquidating Trust
Chevy Chase Associates
Compagnia Boliviana de Energia Electrica, S.A.—Bolivian Power Company Limited
Compagnia de Alumbrudo Electrico de San Salvador
D. H. Baldwin Company
Empresa de Luz y Fuerta Electrica de Oruro
Farmers and Ranchers Life Insurance Company
Kendale Lakes Mall
Lake Sherwood Joint Venture
MAC Development Corporation of Florida, Inc.
Mortgage Guaranty Insurance Corp.
Mutual Management, Inc.
Northmoor-South Apts., Ltd.
Oakhurst Square, Ltd.
Oakhurst Square II, Ltd.
S&H Group, Inc.
The Sperry and Hutchinson Company
S&H Motivation & Travel, Inc.
S&H Investments, Inc.

Office-Supreme Court, U.S.
FILED
MAY 3 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1488

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

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BALDWIN-UNITED CORPORATION
and D. H. BALDWIN COMPANY,
*Petitioners,*

v.

ROBERT M. EUBANKS, III, INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS,
*Respondent.*

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**On Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas**

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## REPLY BRIEF OF PETITIONERS

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**On Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas**

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## REPLY BRIEF OF PETITIONERS

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Petitioners, Baldwin-United Corporation and D. H. Baldwin Company (collectively "Baldwin"), file this reply brief (1) to ensure that the brief in opposition of respondent, the Arkansas Insurance Commissioner (the "Rehabilitator"), does not create any confusion about the relief Baldwin seeks in this Court, (2) to correct the Rehabilitator's misstatements of certain critical facts, and (3) to advise the Court that its opinion in *Metropolitan Life Insurance Co. v. Ward,* 105 S. Ct. 1676 (1985)—which was decided between the filing of the petition for a writ of certiorari and the brief in opposition in this case—is controlling on the merits.

At stake is the ability of the debtor in perhaps the most complex bankruptcy case ever filed to challenge a state court injunction that prohibits it and the bank-

ruptcy court from acting on core claims. This petition must be distinguished from the vast number of others seeking this Court's review. Baldwin is not simply saying, as a well-known reporter once exclaimed: "The death of any human being is terrible, . . . but the most terrible is the death of a human being I am covering." THE NEW REPUBLIC (Dec. 6, 1982). The threat to Baldwin and the authority of the bankruptcy court in this case is real and presents federal interests of the highest order.

1. Baldwin requests that this Court grant the Petition for a Writ of Certiorari [1] and vacate the judgment of the court below or, in the alternative, grant the Joint Motion to Defer Consideration of the Petition for a Writ of Certiorari ("Joint Motion"), both on the grounds that this action is moot.

As recently as March 21, 1985, the Rehabilitator unequivocally stated that this case is moot in papers filed in this Court.[2] Offering no *new* facts to justify revising his earlier declaration, he now urges for the sake of opposing the petition that the case is not "necessarily" moot.[3] *See* Br. Opp. at 4. The Rehabilitator does not, however, assert the one fact that would render this case live: he does not state that he intends to pursue his claims against Baldwin so that Baldwin must reactivate its counterclaims to the same assets.

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[1] Cited as "Pet."

[2] "There being no current live controversy between the parties, the litigation that gives rise to the petition in this case and the dispute between the parties over the injunction entered in that litigation are moot." Joint Motion at 2.

[3] Alternatively, the Rehabilitator suggests that the issues presented are of such public importance that the case should not be treated as moot. Brief in Opposition ("Br. Opp.") at 9-10. Such treatment is only accorded when the issue would evade review if it arose again. *See DeFunis v. Odegaard*, 416 U.S. 312, 318-19 (1974) (per curiam). The Rehabilitator cannot meet this additional requirement.

While Baldwin remains willing to abide by the Joint Motion, if the Court should decide not to grant the Joint Motion because of the Rehabilitator's inconsistent positions, Baldwin urges that the writ be granted and the judgment below vacated, in accordance with the sound precedent of this Court cited in its petition. Pet. at 11-12.

2. If the Court concludes that the case is not moot and that it therefore has jurisdiction to rule on the merits of the decision below, Baldwin requests that the writ be granted and the judgment of the Arkansas Supreme Court be reversed, summarily or after full briefing and argument on the merits.

a) The Rehabilitator confesses that, at bottom, he opposes vacating or reversing the decision below in order to preserve the "stare decisis" effect it may have in later litigation with parties not presently before this Court. Br. Opp. at 10. *See also* Joint Motion at 3. However, in a recent decision this Court rejected the legal premise on which the Arkansas Supreme Court opinion was based. As a result, the opinion does not deserve to control this case or future cases.

In *Metropolitan Life Insurance Co. v. Ward*, 105 S. Ct. 1676, 1683 (1985), this Court held that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), only limits the scope of legislation enacted pursuant to the Commerce Clause. *See also Western & Southern Life Insurance Co. v. Board of Equalization*, 451 U.S. 648, 653, 656 (1981). It does not limit the applicability of other constitutional provisions or legislation enacted under the authority of other constitutional provisions. *See id.*; *Ward*, 105 S. Ct. at 1683. Baldwin argued in its petition that for this reason the Arkansas Supreme Court erred in upholding the injunction in reliance on the McCarran-Ferguson Act. Pet. at 22-24. *Cf.* Br. Opp. at 5, 11-13. This Court's subsequent opinion in *Ward* vindicates Baldwin's position that the McCarran-Ferguson Act does not limit a Con-

gressional grant of jurisdiction pursuant to the Bankruptcy Clause.[4]

b) The Rehabilitator urges that reversal would be meaningless because of the supposititious "res adjudicata [sic] . . . effect" in the bankruptcy court of a nonexistent state court determination of claims to the assets at issue. Br. Opp. at 6. The claims to the assets underlying this jurisdictional dispute have not been filed in or decided by the state court. They have been filed in the bankruptcy court—nowhere else. *See* Pet. at 6-7. The Rehabilitator's repeated assertion to the contrary (without citation) is startling. See Br. Opp. at 3, 4, 6-7, 15. It simply is not true that the March 23, 1984 Order Adopting the Plan of Rehabilitation ("Order") decided these claims. Indeed, the Arkansas Supreme Court found "the record . . . silent as to the size or exact nature of [Baldwin's] claims." (App. A, 5a.)

More importantly, on March 16, 1984, the state court approved a February 2, 1984 Agreement between the parties that set aside the claims and assets at issue here from treatment under the Plan of Rehabilitation, requiring that these assets be held separately "until such time as a final non-appealable order of a court of competent jurisdiction shall have determined what party(s) is entitled to such Affiliate Securities or their proceeds." Agreement at 3. No claims were to be brought for 90 days, *id.* at 2, and this period did not expire until well after entry of the state court's post-hearing Order. Thus, the Rehabilitator specifically requested and the state court ruled that no disposition was to be made with respect to the claims and assets in question until the claims were

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[4] The state court also erroneously looked to the exclusion of insurance companies from the definition of eligible debtors in the Bankruptcy Code, 11 U.S.C. § 109 (b) and (d) (1982), to bolster its position. (*See* App. A, 8a.) The Bankruptcy Code does not provide "[a]dditional support," Br. Opp. at 5, for the McCarran-Ferguson Act argument. *See* Pet. at 21-22.

finally decided. In fact, the Agreement specifically leaves open which court is to make that determination.[5] The Rehabilitator's assertion that claims to these assets were determined by the state court Order is not credible and is disingenuous.

Further, the terms of the Order itself refute the Rehabilitator's contention. The injunction was not issued to preclude relitigation of the question of ownership of property that had conclusively been determined to belong to the insurance companies. The state court concluded only that, for purposes of administration, all assets in the physical possession of the insurance companies at the time of their rehabilitation, including the assets that are the subject of this dispute, should remain under the control of the Rehabilitator pending a resolution of claims against them. The injunction was intended to bolster the state court's conclusion that it had "exclusive jurisdiction . . . to determine the validity or invalidity of all claims against such assets." (App. B, 12a.)

c) The state court's assertion of *in rem* jurisdiction over the disputed assets will not be affected by reversal of the court below. Baldwin seeks simply to litigate *in personam* claims to those assets in the bankruptcy court. *See* Pet. at 19-21. Baldwin does not object to returning to the state court for assignment of priority to collect on the judgment if its claims are favorably adjudicated in the bankruptcy court. *See Old Security Life Insurance Co. v. Continental Illinois National Bank*, 740 F.2d 1384 (7th Cir. 1984).[6]

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[5] Baldwin has never consented to an application of the injunction that would interfere with disposition of these claims in the bankruptcy court. The Rehabilitator's representation to the contrary, Br. Opp. at 2 n.2, presumably refers to the fact that prior to filing for bankruptcy Baldwin consented to the rehabilitation of its subsidiaries. The legal grounds for Baldwin's objection to application of the injunction did not arise until after it entered bankruptcy.

[6] The Rehabilitator's argument that vacating or reversing the court below may threaten the Plan of Rehabilitation strains credi-

## CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, when the Court acts on the petition, the writ should issue and the judgment and opinion of the Arkansas Supreme Court should be vacated, summarily reversed or reviewed.

Respectfully submitted,

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bility. These claims and assets have been set aside from treatment under the Plan pursuant to the February 2, 1984 Agreement.

Nor would vacating or reversing the court below on the questions presented here result in a multiplicity of suits undermining state insurance rehabilitation. The validity of the Plan of Rehabilitation and operation of its broad injunctive language against others not in bankruptcy would not be affected, any more than, for example, a successful challenge to application of a park permit ordinance to certain religious meetings would necessarily strike the ordinance from the books. *Cf. Poulos v. New Hampshire*, 345 U.S. 395 (1953).

There is a much more palpable threat to the bankruptcy proceedings from the injunction. Not only will the bankruptcy court lose control over the insurance company claims, but it will lose the ability to decide the merits of related claims including, for example, an additional hundreds of millions of dollars of claims filed in the bankruptcy court by state Insurance Guaranty Funds who argue that they claim through the insurance companies.